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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 608.

THE COUNTY OF ST. CLAIR, PLAINTIFF IN ERROR,

vs.

JOHN B. LOVINGSTON AND THE WIGGINS FERRY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED OCTOBER 14, 1874.

Oct. 9, 1874

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1 STATE OF ILLINOIS,
St. Clair County, ss:

At a regular term of the circuit court in and for the county of St. Clair, and State of Illinois, begun and held at the court-house in the city of Belleville in said county of St. Clair, on Monday the fifth day of January, A. D. 1874, it being the first Monday of January, A. D. 1874, according to the act of the general assembly, by the Hon. William H. Snyder, judge of the 22nd judicial circuit of the State of Illinois, of which the said county of St. Clair forms a part, the following proceedings were had, to wit:

Present, Hon. William H. Snyder, judge; James W. Hughes, sheriff; Chas. P. Knispel, State's attorney; Chas. Becker, clerk.

Be it remembered, that on the 26th day of August, 1870, the following declaration in ejectment was filed, to wit:

STATE OF ILLINOIS,
St. Clair County:

To the October term of the St. Clair County circuit court, A. D. 1870:

The county of St. Clair, (it being the county of St. Clair, State of Illinois,) plaintiff in this suit, complains, by its attorneys, of John B. Lovingston and the Wiggins Ferry Company, a corporation chartered by act of the legislature of the State of Illinois, defendants—

2 For that, whereas the said county of St. Clair, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of certain premises situated in said county of St. Clair, and described as follows: *Abstract* of land bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out on the plat of the first ferry division, recorded in the books of record of said county of St. Clair; on the east by the west line of survey No. 579; on the west by the low-water mark of the Mississippi River; and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River, which said premises the said county of St. Clair claims in fee; and said county being so possessed thereof, the said defendants Lovingston and the Wiggins Ferry Company, on the 2nd day of August, A. D. 1870, at the county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from the said plaintiff the possession thereof.

And whereas also the said plaintiff, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of the undivided three-fourths parts of certain premises situated in said county of St. Clair, and described as follows: A tract of land bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out on the plat of the first ferry division, recorded in the books of record of said county of St. Clair; on the east by the west line of survey No. 579; on the west by the low-water mark of the Mississippi River; and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River, which said premises the said plaintiff claims in fee, and the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the second day of August, A. D. 1870, at the county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from the said plaintiff the possession thereof.

3 And whereas also the said plaintiff, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of certain premises situated in the county of St. Clair, and described as follows: A tract of land bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out on the plat of the first ferry division, recorded in the books of record of said county of St. Clair; on the east by the west line of survey No. 579; on the west by the low-water mark of the Mississippi River; and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River, of which said premises the said plaintiff claims the perpetual possession, and the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 2nd day of August, A. D. 1870, at the county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from said plaintiff the possession thereof.

And whereas also the said plaintiff, on the first day of August, A. D. 1870, at the county aforesaid, was possessed of the undivided three-fourths parts of certain premises situated in said county of St. Clair, and described as follows: A tract of land bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out in the plat of the first ferry division, recorded in the books of record of said county of St. Clair; on the east by the west line of survey No. 579; on the west by the low-water mark of the Mississippi River; and on the south by the south line of said survey No. 579, extended to low-water mark of the Mississippi River, of which said premises the said plaintiff claims the perpetual possession in said three-fourth' parts; and the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 2nd day of August, A. D. 1870, at the

4 county aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and unjustly with'old from said plaintiff the possession thereof, to the damage of the said plaintiff of $500.00, and therefore it brings this suit.

G. & G. A. KOERNER AND
LOUIS HOUCK,
Attorneys for Plaintiff.

Be it remembered that on the 26th day of August, 1870, the following summons was issued:

STATE OF ILLINOIS,
County of St. Clair, set:

The people of the State of Illinois to the sheriff of said county, greeting:

We command you to summon John B. Lovingston and The Wiggins Ferry Company, if they can be found in your county, to be and appear in the St. Clair circuit court, on the first day of the next term thereof, to be holden at the court-house in the city of Belleville, in said county, on the fourth Monday of October next, then and there to answer unto the county of St. Clair in an action of ejectment for the recovery of the whole and also for the undivided three-fourths parts interest in the following-described premises, situated in St. Clair County, Illinois: A tract of land bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out on the plat of the first ferry division, recorded on the books of record of said county of St. Clair; on the east by the west line of survey No. 579; on the west by low-water mark of the Mississippi River, and on the south by the south

line of said survey 579, extended to low-water mark of the Mis-
5 sissippi River, which said premises are claimed by said county of St. Clair, pltff. aforesaid, in fee, and also by the title of perpetual possession thereof, and also in damages for the unlawful detention of said premises, five hundred dollars as they say, and not to fail under penalty of what the law directs. And this writ you shall have at our said court with your return endorsed thereon.

Witness Geo. M. Roeder, clerk of the circuit court, and the seal thereof hereunto affixed at office this 26th day of August, A. D. one thousand eight hundred and seventy.

[SEAL.]

GEO. M. ROEDER, *Clerk*,
By GEO. VONDERSCHMIDT, *Dpy.*

Upon which there appears the following endorsement:

"Served by reading and delivering a true copy of this writ to John B. Lovingston and Henry C. Creveling, gen'l supt. of the Wiggins Ferry Co., the president of said company not found. Sept. 13th 1870.

JAMES M. STOOKEY, *Sheriff*,
By GEO. VONDERSCHMIDT, *Dpy.*

Serv. & ret., 1.10; mile, 1.50; copies, 1.00—$3.60.

Be it remembered that, on the 24th day of October, 1870, the following plea was filed, to wit:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON. } In ejectment.

6 And the defendant comes and defends the wrong and injury, when, etc., and says that it is not guilty of unlawfully with'olding the said premises claimed by the plaintiff in manner and form as alleged in said declaration, and of this it puts itself upon the country, etc.

By L. V. BOGY, UNDERWOOD & NOETTING,
Its Attorneys, &c.

Be it remembered that at the October term, 1870, the following proceedings were had, to wit:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON ET AL. } Ejectment.

On the fifth Monday of the term, it is ordered by the court that this cause be continued.

Be it remembered that, at the March term, 1871, the following proceedings were had, to wit:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGTON ET AL. } Ejectment.

On the fourth Monday of the term, the court orders that this cause be continued.

And at the October term, 1871, the following proceedings were had, to wit:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND THE WIGGINS FERRY Company. } Ejectment.

7 On the second Wednesday of the term the defendant The Wiggins Ferry Company moves the court for a change of venue of this cause, and files its affidavit in support thereof, which motion is by the court denied, and thereupon issue being joined, the court orders that a jury be called, and twelve good and lawful men, to wit, &c., are chosen and sworn according to law, and after hearing the evidence and arguments of counsel, the jury, on the second Friday of the term, November 3rd, 1871, return into court the following verdict, to wit: We the jury find the defendants guilty of unlawfully with'olding the premises in the plaintiff's declaration described, and that the plaintiff is entitled to an estate in fee-simple in the following-described premises, to wit: A tract of land bounded on the north by the southern line of the first ferry division of the city of East St. Louis, as laid out on the plat of the first ferry division, recorded in the books of record of said county of St. Clair; on the east by the west line of survey No. 579; on the west by the low-water mark of the Mississippi River; and on the south by the south line of said survey No. 579 extended to low-water mark of the Mississippi River, in the county of St. Clair and State of Illinois. Whereupon the defendant moves the court for a new trial, which motion is by the court overruled pro forma. It is therefore considered and adjudged by the court that the plaintiff recover of and from the said defendants the above-described premises, and that it have a writ of possession therefor, and also an execution for its proper costs herein to be taxed. Whereupon the defendant (Wiggins Ferry Company) prays an appeal to the Supreme Court, which is allowed upon giving bond in the penal sum of $500.00 conditioned according to law, with security to be approved by the clerk of this court by consent of parties, said bond and the bill of exceptions to be filed within thirty days. And now, on the third Wednesday of the term, Vital Jarrot is accepted as security on said bond, and the same is by the court approved.

8 And at the October term, 1872, the following proceedings were had, to wit:

COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON & THE WIGGINS FERRY Company. } Ejectment.

And now, on the 29th of October, 1872, come the defendants, by Underwood and Noetting, their attorneys, and it appearing to the court that this cause was tried at the October term of this court, A. D. 1871, and that defendants have paid all the costs therein, on motion of said defendants the judgment rendered herein at said term of court is set aside and a new trial is awarded, according to the statute in such case made and provided, and this case is continued.

And at the March term, 1873, the following proceedings were had, to wit:

COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGTSTON & AL. } Ejectment.

On the first Wednesday, on motion of defendant, the court orders that this cause be removed from the docket.

Be it remembered that on the 15th day of January, 1874, the following final order of supreme court was filed, to wit:

At supreme court begun and held at Mount Vernon on Tues-
9 day, the fourth day of June, in the year of our Lord one thousand eight hundred and seventy-two, within and for the southern grand division of the State Illinois, to wit, on fifteenth day of June, A. D. 1872:

Present—Charles B. Lawrence, chief-justice.
" Pinckney H. Walker, associate "
" Sidney Breese, " "
" Anthony Thornton, " "
" John M. Scott, " "
" Benjamin R. Sheldon, " "
" William K. McAllister, " "

JOHN B. LOVINGSTON AND THE WIGGINS FERRY Company, appellants,
vs.
THE COUNTY OF ST. CLAIR, APPELLEE. } Appeal from St. Clair.

"On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error; therefore it is considered by the court that for that error and others in the record and proceedings aforesaid, the judgment of the circuit court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain. And it is further considered by the court that the said appellants recover of and from the said appellee costs by them in this behalf expended, and that they have execution therefor."

10 I, R. A. D. Wilbanks, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above-entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Mount Vernon, this thirteenth day of January, in the year of our Lord one thousand eight hundred and seventy-four.

[L. S.]

R. A. D. WILBANKS,
Clerk of the Supreme Court.

Be it remembered that at the January term, 1874, the following proceedings were had, to wit:

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND THE WIGGINS FERRY Company. } Ejectment.

And now, on the third Monday of the term, January 19, 1874, comes the plaintiff, by Houck and Koerner, its attorneys, and the defendants, by Underwood & Noetting, their attornies, and by consent of parties this cause is submitted to the court without a jury on the testimony in the supreme court record, and the court, after hearing the evidence and arguments of counsel and being fully advised in the premises, finds the defendant not guilty. Thereupon plaintiff moves for a new trial at common law, which motion is denied by the court; to which ruling of the court the plaintiff excepts. It is therefore considered and adjudged by the court that the defendants recover of the plaintiff costs by
11 them in this behalf expended, and that they have execution therefor. Whereupon plaintiff prays an appeal to the supreme court, which is allowed by the court upon filing a bond in the penal sum of two hundred dollars, conditioned according to law, with security to be approved by the clerk of this court; bond and bill of exceptions to be filed by the 20th day of April, 1874.

Be it remembered that on the 30th day of March, A. D. 1874, the following bill of exceptions was filed, to wit:

STATE OF ILLINOIS,
County of St. Clair, ss:

In circuit court. Term A. D. 1874.

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND THE WIGGINS FERRY Company. } Ejectment.

Be it remembered that on the trial of this cause before the court the following was the evidence for the plaintiff:

EDWARD RUTZ, being duly sworn, testified as follows:

I know this tract of land, bounded on the north by the southern line of the first ferry division, on the east by the western line of survey 579, on the west by the low-water mark of the Mississippi River, on the south

(Annexed map is here shown witness.)

(Here follows map marked "Page 11.")

12 I have seen this plat before; that is the tract of land where the name of John B. Lovingston is written. I think that Mr. Lovingston told me in August, 1870, that he had leased it from the Wiggins Ferry Company. I could not tell whether he had used it in any way; I do not know. He claimed to have leased it from the Wiggins Ferry Company. At present I am treasurer and assessor of the

...y. I am satisfied that it is the tract of land described in the dec-...tion. It is what we call washed-on land. It is a sand-bar now. I ...e here to this State in 1848, but I was gone about 10 years. I have ...n surveyor, and am now assessor four years. This tract was not in its ...sent 4 years ago, when I first saw it. These lands change ...ery year more or less. I guess it has rather increased during the four ...ars. I have never seen it overflowed. I was never down there when ...ey had any high-water. I don't recollect of any vegetation on it ...when I first knew it. I used to be county surveyor of this county ...about two years; that was before I was treasurer and assessor. There is no doubt about the identity of the tract.

Cross-examination:

In reference to the island, they call the whole river-front the island. A very small portion of this tract is east of the present Cahokia Creek. It is not a strip; it is a corner. The island is all gone. I suppose this is the island. The tract is opposite this survey 579—between that and the river; this square piece. I cannot tell you how far the island runs down now. It might run to New Orleans. This (pointing to tract within the yellow lines) has added on to this island. This is marked down as the Cahokia Creek. This is all one piece now, all down to the Cahokia Creek. It is difficult to state whether all west of Cahokia Creek is now the island as it exists. The old Bloody Island I think was
13 way above; they call it now "The Island." The top of this island is now washed away. It is mostly all gone, and the lower part has been added to. The Cahokia Creek is the only water that separates this from the Mississippi River. This here (pointing to Lovingston tract) is the part they sue for. It is west of survey 579, all from there west to the river. I suppose that has been formed by the washings of the river.

Redirect examination:

As far as I know, the head of the old island has been washed away. I know only from the maps. The island, according to this map, ended here originally. I think there are about 40 acres of it left now. I don't know how many acres there are embraced by these yellow lines. I wouldn't call this embraced by these yellow lines "Bloody Island;" Bloody Island is up here, (pointing towards the main dyke.)

Recross examination:

Q. Has not that all been called Bloody Island ever since you have known it?

(Objected to. Objection overruled.)

A. All I know about it, they call this strip—you might call it accretion—they call it now "The Island." Whether it is "Bloody Island" or any other island I don't know. They call it "The Island" down there. At present there is no island. When I first came to this place I recollect an island called Bloody Island, which was separated from the main shore.

Re-redirect examination:

Some of this land is south of the creek as the creek now runs. Here is a little. This part is not opposite survey 579. I expect what Lovingston is in possession of extends clear back to the creek. I believe he was not in possession of any east of the creek.

14 GUSTAVUS HILGARD, being duly sworn, testifies as follows:

I now hold the office of county surveyor. (A map is here shown wit-

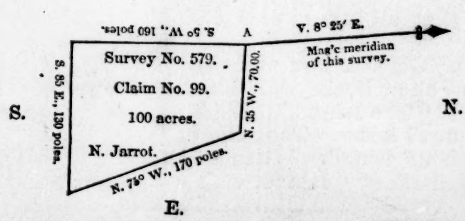
ess.) I made this map by order of the county court of St. Clair. I have surveyed it as the county surveyor. This is a correct map of localities in the neighborhood of Bloody Island. (Witness is shown the map that was shown to preceding witness.) I have examined this map; it is all about the same thing, only the shape of Bloody Island is a little different. This tract is west of survey 579. It is right north of Cahokia Creek; it takes in a portion. The tract that Lovingston's on continues in a straight line with the survey and then runs down to the river. It takes in the whole of 579. The declaration describes the tract properly. The southern line, the ferry division, is the south line of 624; it makes the north line of survey 579. There is a dispute about these lands, but that don't cut any figure in the case. That is between the ferry company and the Cahokia commons. The line of the first ferry division is extended to run to the southern line of survey 624, which make it the northern line of survey 579. [The map first shown witness is again shown to him.] I have known this Mississippi River there since I was a little boy; I have run out the lines according to the field-notes of the U. S. surveys. I have got the directions, courses, and distances correct according to the U. S. field-notes, except the accretions. I surveyed the accretions; the others are all according to the U. S. field-notes. What is yellow-colored on this map was not surveyed by the U. S. I made the survey myself. Bloody Island has been surveyed by the U. S. According to these surveys and the map, Bloody Island, when it was surveyed in 1824, was about ¾ of a mile north of the tract in question. Speaking of survey 579, which was on the old bank of the river, there was a line run by the U. S. It was according
15 to the field-notes that all the lines were run. This is a correct map. The plat and field-notes in the U. S. office corresponds with my notes—just a copy of the field-notes of survey 579. The Mississippi River is not given as a boundary on the plat.

Plaintiff's counsel offers the plat and field-notes above testified to in evidence.

(Copy of plat and field-notes.)

(Here follows map marked page 15.)

16 *Survey No.* 579, *claim No.* 99.



Surveyed for Nicholas Jarrot, who claims in right of Jean Dunwehel 100 acres of land. Beginning on the bank of the Mississippi River, opposite St. Louis, from which the lower window of the U. S. store-house in St. Louis bears N. 70¾ W.; thence S. 5 W. 160 poles to a point in the river from which a sycamore 20 in. dia. bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W. 70 poles to the beginning.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, Feb'r 17th, 1869.

This is to certify that the foregoing plat and description of survey No. 579, claim No. 99, is correctly copied from page 91 of book No. 2, marked "Private Surveys in Illinois," which book is up to this day preserved in this office.

FREDK. MOSBERGER,
U. S. Recorder,
By E. H. HESS, *Dpty.*

[U. S. rev'ue. $0.05.]

17 This land in question is made land. I think I was swimming there in 1854. It was covered with water as late as 1854.

Q. In your opinion, how was it made; what caused it?

(Objected to; objection overruled.)

A. That tract of land was formed by the construction of the so-called coal-dyke—the Pittsburg coal-dyke. The upper dyke also had some tendency to fill that up. If the upper dyke and other improvements above had not been made it would not have increased so largely as it has. It was owing to the operation of both these dykes, but according to my recollection it was formed from the construction of that coal-dyke. The dyke that was made by the city of St. Louis in 1852 is where they travel over now with teams. That caused the formation of all the accretions there on the island. Bloody Island, when it was surveyed in 1824, was about a quarter of a mile above the present dyke—north. The southern point of Bloody Island was in '24 about three-quarters of a mile from the tract now in question. This is my certificate, (referring to the certificate on the map.)

Between the island, as they call it, and survey 579 there is some low land, and then the present bed of the Cahokia Creek runs through it. In time of very low water you may cross from survey 579 to the Lovingston tract on foot. There is always a slough and running water. In high water you can't cross except in boats. When the river is in an ordinary stage it is not passable on foot. It is made land and was covered with water as late as '54, the entire tract that is now sued for. When the river is very high I think it would overflow now. The rivet'ing or paving the bank with stones by the Wiggins Ferry Company had the effect of retaining the land that was made after it was made. It does not protect it from overflowing except it is made higher than
18 the surrounding land. The rivet'ing don't keep the current of the river out in time of high water when the river raises. In ordinary stages it protects the land. It keeps it from washing away. I am not prepared to say positively, but I presume that the land lying to the west of the Cahokia Creek is lower than the top of the bank lying to the east of it. Cannot say positive, because I never had a level there. In some places there is a clear and well-defined bank east of the Cahokia Creek. In the building of the R. R.'s and things they have dug up the old bank near the round-house. I suppose you can distinguish the old bank of the river before the dyke was built. It is just as I tell you right near the round-house and the Belleville R.R.; you cannot well define the bank, but a little further above and below you can define *you can define* the bank.

Cross-examination:

This land all lies west of survey 579. One of the cause, of this formation is the building of the Pittsburg R. R. dyke. Another cause is the

dyke constructed by the Wiggins Ferry Company above. I don't think the putting of rock between the island and West St. Louis by the Wiggins Ferry Co. helped to form the land there. If they had not put rocks there it would not have washed the whole island off as long as they kept up the dykes. The dyke was protected by the rocks. The dyke went to the bank of the river. I know that the Wiggins Ferry Company have graded down to the river on the west side and spent large sums of money. It protects the land that is there. This land sued for lies south of what was originally the old Bloody Island, and west of this claim 579.

What is called the Condaire claim, or survey 786, includes these three surveys 579, 624, and 776. It includes them and also includes the
19 fractions on the east of those surveys up to the creek. The number of the Condaire survey is 786. These are the field-notes of that claim as far as I could see. This survey makes the river the boundary, but at the same time it commences at the corners of the former surveys. It commences at survey 766, and then runs along including them fractions to the southwest, and includes the entire tract below survey 579, and then says, passing N. Jarrot's corner, so many rods, leaving the other parts undisturbed. It leaves the lines of the other surveys undisturbed. It says, "along the river," but at the same time it makes this corner which the old survey makes in the river. (Witness is here shown a paper.) This is a plat of that land. These three surveys were surveyed before by the Government giving the corners, distances, etc., and witness-trees. There was some tracts left between them surveys and the creek. Somebody went and got another survey, including them three surveys and taking in them fractions, and at the same time running below this survey and taking in another part, stating in the field-notes at so many rods passing this corner. So it strikes this corner and wherever the other corner was made. (The defendant's counsel reads the field-notes of the Condaire survey to witness.) That is right, and it runs up to the corner of this survey. I have surveyed the western line of the Condaire tract. That is the boundary on the river, the west line of that claim. I have not run the east line on the creek. The west line is the river-bank or what used to be the river-front when they were surveyed. This land is all west of the Cordaire tract.

Redirect examination:

The Cordaire tract covers the three other surveys. The line of the Cordair tract is to be the same as the line of 579, because those other lines were run first, and the notes of the Condaire claim made the same corners.

20 Recross-examination:

We couldn't tell exactly whether the river was there or not, because in one of the notes it says "to a point in the river." We could only run by distances in these surveys where we could not find any witness-trees. As the river is changed, we couldn't tell whether that line was exactly on the river or not. The language "up the river and binding therewith" is very plain, and if the same language had been used in the other lines, there would have been no doubt; but we are governed by the first notes. I don't follow the river at all; we have to go by the distances and courses.

(Plaintiff's counsel introduces Hilgard's certificate on plat, which he marks "1," and is copied above. Objected to; the court allows it to go in, and says the point can be reached by an instruction.)

JONATHAN MOORE, being duly sworn, testified as follows:

I have known the territory opposite the city of St. Louis, beyond the Cahokia Creek, where the Mississippi River used to flow, and what was called Bloody Island, since 1813. I made a survey of that island, or part of it, in 1852. I have reference to all this land that is marked light yellow. (A map is here shown witness.) I run down a piece on section two. We didn't cross over the section-line of section two, and we went into section 14; that is not put down here I believe. My survey embraced part of section two, then up here to section 11 and down through section 14. When I first knew Bloody Island it didn't run below the line of the upper ferry-landing. In 1819 and '20 we run
21 straight across from opposite of where the Missouri Hotel used to be; but after a time we had to round the point of the island. I first knew Bloody Island about 1814. I think that is the first I ever noticed much about it. There was a duel fought there then. There was a very few houses in Illinoistown then. I recollect the old brick house—the Pensoneau House; a bridge across Cahokia Creek, just below that. The Penticost House was across the creek. That old brick house at that time must have been near three-quarters of a mile from the ferry landing, may be more; it was fully that I should think. In the year 1814 we could run straight across from the ferry above Day's Ferry, to the street that the Missouri Hotel was on—below the island. I think the Missouri Hotel was on Oak street. From that they could run straight across. We run straight across from Morgan street to the landing, and didn't touch the foot of Bloody Island at all. In time, years afterward, they begun to round a little point, and there was a bar formed on the Missouri side, and there was a narrow pass there. The bar was forming on the Missouri side and running up, meeting the bar from that island.

I recollect of the U. S. boats working in the river above the island, but I don't know what they were doing, only from what I heard. I heard they were putting obstructions to keep the river from turning—to keep it towards the St. Louis shore.

I recollect when this dyke was built by the city of St. Louis. I don't know exactly what year. I think there was something doing at it when I was there surveying, but I don't know—there was not much of it; it was not across. I was appointed by the governor of the State to survey the swamps and overflowed lands in the county of St. Clair, and with them instructions I went and surveyed that island. I was instructed to take none but Government land, and obtained a copy of all the entries so as to select the public land. I went through the county
22 selecting that land. I returned it as swamp land to the auditor of the State; surveyed it in '52. I included in my survey the land that was south. We went down to section 14 and up into 13. Section 14 is below section 12. (Witness points out sections 11, 12, 13, and 14, on the map.) We didn't go clear through the whole section—about half across it. I returned that land to the governor as swamp-land. I don't know that that land had ever been offered in market by the Government. There was a very small slough between Bloody Island and the main shore. I had a little plat of it in 1808. The island was a very small place when I first knew it. A small part of the river run on this side and a large part of the river run on the other side—the west side. As time went on, it gained on this side and lost on the other. Before that dyke was made there was a good deal of the river on this side. I am not posted in regard to what caused this land south of the island. I know we heard a great deal about the work that was done by St. Louis to prevent the river coming across to our bluffs. I cannot say

whether the dyke made in '48 and the Pittsburg dyke, made this land or not. I should think it was making without them. The river from the mouth of the Missouri struck across and struck the Illinois shore, and that is what caused the washing away from the river on this side. It has formed a good deal faster since the dyke was made. Before the dyke was made the river was coming on this side of the island, and would, I suppose, but for the labor that was done to prevent it. The current being on this side the land could not have formed at all.

Cross-examination:

It was a very small island when I first knew it, in 1814, so I never anything about Thompson's survey in 1818. I don't know that it was surveyed by the Government before the State. I went to the land-office to ascertain when I was surveying the swamp-land, and I
23 could not ascertain. I didn't lay off all of Bloody Island as swamp-land; I didn't encroach upon the entry that Wiggins had there. When I surveyed it the larger portion of Wiggins' entry had washed off; the additions were mostly right east from there.

Q. To prevent the whole from washing away, has not the Wiggins been to a great deal of expense putting rocks there?

(Objected to.)

I don't know that Wiggins spent anything. I know that the citizens of St. Louis worked there, filling in rock. I understood it was the city of St. Louis that was doing the work, and the U. S. some of it; I don't know that that *that* is so. I know that there was rock put in to nearly the levee there, but I don't know who done it. I can only tell you what I understood; I wasn't there to know. I understood the rock was put there by the city of St. Louis with a view of cutting a sand-bar. I mean along the west side of the river they threw rocks. I understood it was with a view of keeping a bar from forming down nearly the south part of St. Louis. It was forming a bar there, running up and meeting the island. I don't know anything about it, but I understood that.

The Wiggins Ferry Co. may have put in rock there, and they may not; I don't know. I never surveyed the Condaire tract. I don't know that I am prepared to answer what the words "up the river and binding therewith" mean; if I was to see the notes I would understand. I would run to the corner of the Nicholas Jarrot survey. We follow the notes when we survey. It goes according to the notes, from one point to another. Where I find a line running to the middle of a certain creek, and running such and such courses, pointing them out, to the center of the creek, then we understand the center of the creek
24 to be the line; but where the line runs from one corner of the survey to another, we run from one point to the other. I couldn't say whether these lines are run along the river in order to ascertain the quantity only or not. If we get the quantity where a river is made a line, we have to meander the river—and it is done often; but if the line is straight, we run from one point of the river to another.

A. G. MOORE, being duly sworn, testified as follows:

My profession has been that of surveying. I, in company with Mr. Holbrook and Jonathan Moore, surveyed Bloody Island, or what was termed Island No. 3. I made a correct plat of our work and the notes. I have got the field-notes of our work—all of it—and the notes of original survey of Island No. 3, and the connection of it also, (produces the plat.) The county court sent me down there to make the survey; the

sheriff took me. The object was to assist Jonathan More, the swamp-surveyor, in surveying swamp-lands and ascertaining about Island No. 3. That *that* we surveyed in 1852 was the island with a portion of Island No. 3 left. There was but a few acres of Island No. 3 in '52—but a very small portion—I suppose 15 or twenty acres. This line here (pointing to his plat) is the original east bank of the Mississippi in 1808, as surveyed by John Messenger, senior. In 1818 the river had fell in that much, (pointing.) Thompson intersected the river that much sooner than the survey of Messenger, in 1808. In about ten years the river had come to Illinois that much. The line between sections one and twelve was the base that Censtine, or the Government surveyor, made to survey the Island No. 3. He commenced on the range-line and run a line here; he run a mile here and set a corner—corner to section one, two, eleven, and twelve, as he numbered them. He
25 intersected the bank of the river there that much sooner. He next reports 26 chains and some links from this corner; he next took the east shore of Island No. 3, near timber; he next continues the course eight chains west, and establishes a corner—that is that corner, the western corner—and there he notes two cottonwoods two inches in diameter each, and then he returns back to this corner and commences to meander Island No. 3 as he surveyed it, and this is the western boundary of it as he surveyed it. He made 128 acres in section 11 and three acres and something in section two on the island. That contained Island No. 3. Now, we made this survey from this point. The island never reached south of the section-line between 11 and 14. We commenced here, run in here, intersected the river there. We run to this point here and intersected the island. We took all the land we could, because I went over two feet into the quick-sand. From this point noted a mound, but, of course, we took no distances; it was all water; then we continued around here, and this was all water; and we went up here. There is the southern point of Island No. 3. I have it from hearsay that Thompson was the Government surveyor. A lot of land in 2 that belonged to this original survey is gone—washed away. It has gone down towards New Orleans, I suppose. I don't hardly suppose the part of the Island No. 3 that was left would have reached 20 acres. All outside of our survey, to the eastern bank of the Mississippi River, was water in '52. We reached the island in a skiff, by employing a man to take us across. There was no dyke there, as I know of, then. Mr. Gibson was our flag-man and our skiff-man. When we were on the island some of the company of us noticed some men working. I don't know how far up north; we could see them move. We asked the question what they were doing.
26 (Objected to.)
They were working up there. I didn't go up to see what they were doing. (Witness is here shown map marked "No. 3.") I suppose this is the same line that I have platted here. All below that piece, where I went into the quicksand, in '52, was water to the eastern bank of the river, and, in fact, all east of our survey, most of it or the whole of it, was water that we had to cross at that time. I don't know whether this land that is now in controversy was under water or not. I cannot tell whether this land opposite to this survey that has been formed, was water or what it was. Mr. Hilgard made the survey. Between the survey that we made and the eastern bank of the Mississippi River, was water. We had to cross in a skiff to our work. Those bars that have formed in front of the eastern shore have all been formed since I was there, I suppose, if there is any formed there at all. I have never been

down there since. It is 19 years now. I crossed the river once since. It was the dykes or the rocks that was sunk there—the filling up of the channel that caused the making of this land there. The channel, I recollect very well, was all on this side of the island, or very near it. The whole of the ice come down there.

I saw it once myself. It was nearly the same as eddy-water between the island and East St. Louis. It had washed the main channel here. It wasn't in the original surveys. In 1808 the river was 73 chains wide; according to Messenger 73 chains wide on the town line between Madison and St. Clair. Six miles below it was 71 chains—so reported by John Messenger, senior. I mean the whole Mississippi River. There was two chains difference in the width of the river in six miles. Messenger was township surveyor. He run the town-line in from the
27 town corner till he intersected the Mississippi River; thence he turned his course and meandered the river down six miles to the other town-line, and then run that line in; and he gives the width of the river at both points: one is 73 and the other 71 chains. It is some less than a mile. Where we crossed it was 11 chains and 20 links between Bloody Island and the main shore. The original island, No. 3, did not quite reach the southern line of section 11, originally. That plat shows what was done. It states every word that was done exactly, and indicates the lines in 1852 is the lines that we run, and the line that was run by Messenger is set down. Messenger was not county surveyor at that time—he was Government surveyor. He was county surveyor here for several years. There was a John M. Messenger, his son, but it was John Messenger, senior. I cannot tell whether he was ever in the employment of the Government except as a subordinate. I understood this, that John Messenger was employed by the Government to run the townships off with the understanding that he was to have the sectional work, because it is not considered that there is much money in running the townships, and Wm. Rector got the contract and Messenger was a little huffy about it and didn't work—as a subordinate—much if any. That is my understanding about it. I don't know whether it is so or not. It was common talk.

Cross-examined:

Of the original island I make, in section 11, 128 $\frac{80}{100}$ acres. I see that there is some calculation that makes 128 $\frac{86}{100}$. There is only so much difference in our calculations; and in section two 3 $\frac{27}{100}$ acres, which would make a little over 130 acres in the original survey. There was about 130 acres, as run by the Government of the U. S. The plat shows how the lines were run. Messenger meandered along the
28 river in 1808. He didn't survey Island No. 3. Thompson, it is said, surveyed Island No. 3. (Witness here reads aloud the field-notes of the Government survey of Island No. 3, as given before in his testimony.) We were never called on to make the calculation of how much of the island as it was then survey' was left in '52. I should set it down between 15 and twenty acres. The west part of the island had washed away, and the north part too. All west of that line (pointing.) Down here there were additions formed. In surveying the island we surveyed just as near the water as we could. We took our courses and run direct from point to point. There might have been a few feet sometimes that we left—the river on our left—that is the manner in which surveys are made—and the island on our right; and there might have been a few feet sometimes that the line wouldn't touch the center. We don't make surveys just exactly to the creek. We run direct from

point to point. All was water east of that island in '52, to the east shore of the river, and all below was water. We took in all we could get. I cannot tell how Mr. Hilgard has located that survey. I have a map but I misplaced it, and didn't bring it with me. The main channel of the river was on the west side of the island, originally. About the time I made this survey the main channel was on this side. The bank on the east side had washed away largely—considerably. I don't know how much. It could be very easily ascertained by calculation. When this dyke was constructed across to the island it filled up, of course, but it changed the current onto the west side of the island, and it begun to wash it out between that and St. Louis, and the other began to fill up. I have never been on the island in fifteen years to survey. It was done in '52. I have been there since, but not with the compass, only once.

29 11 years ago I passed through. There was no houses, no buildings on the island when we made the survey, except a shanty throwed up for a few engineers from St. Louis that wanted to find out, I suppose, what we were there for. I was acting under the county court—was acting under Jonathan Moore as assistant. Mr. Holbrook and myself were appointed by the county court as assistants to him, and we went down and made that survey. That is (referring to his plat) a plain plat made for my own private use. The landing of the Wiggins Ferry Co. was south of the island in '52. They couldn't cross where we were. I don't know about their putting their landing on the island after the dyke was made. I have not been there. I crossed there once just at daylight. I have not been there but once in 19 years, and I just passed through there. There was a few houses in what is called East St. Louis, and I think it was the R. R. boat we came across on. I know it was, because we come on the North Missouri R. R. cars. Three of us was carried across. It was the R. R. conveyance, and was put in the train, and I came to Lebanon, and I have never been there since.

You are welcome to that plat. It was made from John Messenger's survey, in 1808.

The above plat and another are marked "Defendant's Exhibit 1" and "Deft's. Exhibit 2," and offered in evidence.

(Here follows 2 maps, marked "page 32.")

30 WILLIAM MCCLINTOCK, being duly sworn, testified as follows:

I first seen the Mississippi River on the evening of the 19th of March, 1819. I did not notice the island that was called Bloody Island till the next day. I could not say precisely nor near possibly how far out in the river, but I suppose it was from the Illinois shore to the edge of it, from 200 to 300 yards apparently. The Wiggins Ferry landing was not at all when I first knew the island. It was then called Campbell's Ferry. The crossing Cahokia Creek, the point then known was the old Pensoneau House, in Illinoistown. The crossing of the Cahokia Creek was on a bridge immediately below the corner of that house, and the Campbell's Ferry, then on the Mississippi, was a little below that bridge. Apparently it was a half mile or more to the foot of Bloody Island. Subsequent to 1819 I have been to St. Louis till the year 1850. I have been less to St. Louis than I was the first ten years. I was in the country. Till the building of the dyke the channel between the island and the Illinois shore widened. A' one time the deepest water was on this side of Bloody Island. The main channel of the river was in ordinary times this side of the island. At one time it was difficult for boats heavy and of deep freight to get to the harbor of St. Louis. There was at one

time, from the head of Bloody Island to this shore, some improvements made with a view of throwing the channel to St. Louis. I never examined them; wasn't there at the time of their making. I only know it from report. I know now those sand-bars that have formed below the island only in passing. I see there was bars. There was water where the present bank is till the dyke was made. The Mississippi River bank kept continually washing away. The town of Washington was above what is now, and was then, the Wiggins Ferry. I used
31 to stop sometimes in the town of Washington, because I was a little nearer the then ferry than at Illinoistown, and I thought a little better accommodation. The Mississippi River was washed away more or less ever since I first knew it, at that point, till the dyke was made and it was stopped by riveting. Those sand-bars south of Bloody Island were produced by washing of the bank there by the water, in my opinion. After the dyke was made, and the river thrown to wash away Duncan's Island on the other side, that was the cause to give a harbor to St. Louis. The river left this side from the fact that there was an eddy formed in water, and the rise of the water bringing the sand in that eddy it sunk there and formed those bars that are there now.

Cross-examination:

That is the old Illinois shore; a great many years perhaps this land has been washed away between Cahokia Creek, opposite the Thomas House. I am not able to locate it now, whatever it was, half a mile from the house to the bank of the river. I cannot say that it was the flood of '44 that turned it into the Mississippi River, but I know that it first washed away the house, and it eventually came in a little below or about the place of the Southern R. R. I have travelled over the R. Rs. more to St. Louis than any other way; as to these lines, gentlemen, I know nothing about. At the east bank of the Mississippi the land washed away. I think that the first accumulations were further out into the river adjoining those islands. At one time I was going on a steamboat and we run on a bar here. They had a difficulty of getting into St. Louis, and had to incline more to the Illinois shore, and we run on a bar and couldn't get into St. Louis till we took the channel up on this side of the river. This was, I believe, before the dyke was
32 made, because I was in business with John D. Hughes here, and at the time the dyke was made I was in the clerk's office. From the time I quit selling goods at Belleville I didn't go to St. Louis so often. I don't know who the land belonged to that was washed away. There was a log house where Singledon used to live, and I happened to be crossing from Illinois to the Missouri shore, and I saw that house fall into the river. I don't know of the pretty large store of Singleton being washed away, but I have no doubt it was. I was sleeping in the house below Wiggin's boarding house, a tavern, one night, and the bank kept washing away as usual, and a tree fell just above the house and the roots of that tree held it in the bank, but it washed under the corner of the house from ten to 15 feet. I concluded to stay on the shore side, and got out of the house. The next day they got the house removed back further. What is now called the bank is certainly further west than it was at one time. There is no doubt about the Ferry Co. putting their landing on the island after the dyke was made. I did know that somebody put rock-work there to prevent the west side of the island from washing away after that, at least there was rock-work constructed there. The riveting of the island kept the wash from it, and then when it overflowed in this eddy the sand settled and filled up between this bar that

I told you of in the Mississippi River, and that, putting rock in front of that island by the Wiggins Ferry Co., I think helped to keep it from washing away.

Redirect examination:

Below the Bloody Island, as it then was, there was a pass-way for the ferry-boats and other boats to St. Louis. Below the pass-way there was a bar formed, on to which I stuck two hours on a boat re-
33 turning from the east to go into St. Louis, a bar formed that had no connection with the shore or with Bloody Island; it had no connection with the island nor with the eastern shore of the Mississippi River. That was as far back as 1839, '40, or '41. I travelled the river from '36 till '39.

Col. JOHN THOMAS, being duly sworn, testified as follows:

(Witness is shown the first map.) In regard to the location of the land I have no knowledge. I know a piece of land that is run through by the Cahokia Creek below Bloody Island. I cannot tell you what year it became land. When I first traveled the Mississippi, I think it was in May, 1818—at that time I don't recollect of seeing Bloody Island at all. It may have been owing to the tolerably high stage of water. Subsequently I noticed a small island there—Bloody Island. The ferry-boat then generally passed below Bloody Island, the main ferrying, and it continued that way. The Bloody Island bar increased and the bars below, and, as Mr. McClintock stated, there was a channel where the boats went, and below that in times of low water another bar appeared, and this continued pretty much in that way, according to my recollection, below the island till the construction of the dyke, and subsequent to that the sand filled up and it is all connected together. I don't recollect the year the dyke was constructed, but I suppose it was along about '52 that the dyke was constructed. It was after '44, I know. There was bars in '52 below the levy here and where this creek runs through. There was quite a channel between them and the main land. They were not connected with Bloody Island. At the time of low water they were separate bars, in time of high water it was all covered.
34 Plaintiff's counsel now introduce a law of the U. S., approved March 3rd, 1791. (Vol. 1, U. S. Statutes at Large, 221.)

Also law of '69, approved July 15th, 1870, entitled—chap. CCCL—"An act to confirm title to certain lands in Illinois.

JULY 15th, 1870.—Title of the United States to certain lots, &c., in St. Clair County, confirmed to said county.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title of the United States to all lots, out-lots, tracts, pieces, parcels, and strips of land in St. Clair County, State of Illinois, lying and situate outside of the United States surveys as noted in the field-notes of the United States surveyors, and on the Mississippi River near surveys seven hundred and sixty-six, six hundred and twenty-four, and five hundred and seventy-nine; and near and adjacent to fractional sections one, two, eleven, and twelve; town[ship] one north, range t n west, third principal meridian, be and the same is hereby confirmed, and granted to said St. Clair County, in said State: Provided, that nothing herein shall apply to the ancient French commons in said county. Approved July 15, 1870."

Proviso.

Also a law of Illinois in '59, entitled "An act for the sale of swamp lands." Statutes of 1859, page 200.

Also Session Laws of '69, page 243.

Plaintiff rests.

35 Deft.'s counsel read in evidence the report of Michael Jones, dated January 18th, 1813, in favor of the claim of Pierre Condaine, on the east bank of the Mississippi fronting the town of St. Louis, in vol. 2 of American State Papers, page 615, as published by Duff Green, in A. D. 1834; also an act of Congress of April 16th, 1814, referring to vol. 3, U. S. Statutes at Large, pages 125 and 126, confirming said report & claims.

Also, certified copy of plats and field-notes of certain surveys made in January, 1815, after this confirmation by Congress.

SPRINGFIELD, *June 8th*, 1871.

Survey No. 786, claim No. 2667.

Surveyed for the heirs of Pierre Condaire, who claims in right of Pierre Condaire 400 acres of land on the east bank of the Mississippi River and opposite the town of St. Louis.

Beginning at a post on the northwesterly of the heirs of Richard McCartys, survey No. 626, claim No. 1316, from which a hackberry 6 inches in dia. bears S. 51° E. 22 links, and a honey-locust 3 inches in dia. bears N. 30° W., 12 links; thence S. 30°, 50 W., with said line of said survey 17 poles, to a post from which an elm 18 inches dia. bears S. 25° W., 40 links; thence S. 51° 10′, E. with another line of the heirs of Richard McCarty's said survey, (passing a corner of Nicholas Jarrot's survey, No. - , claim No. 100, at 36 poles,) 134 poles to a post on the westerly side of the river L'Abbie, or Cahokia Creek; thence down the said river or creek with the different courses thereof, S. 74, W. 9 poles; N. 28, W. 26½ poles; N. 80, W. 17 poles; S. 66, W. 17 poles; S. 10, W. 13 poles; south 32 poles; S. 5°, W. 30 poles; S. 21, W. 182 poles; S. 12, E. 50 poles; S. 23, E. 22 poles; S. 12, W. 22 poles; S. 37° E. 88 poles; S. 20, E. 54 poles to a post from which—thence N. 85° W. 174 poles, to a post on the bank of the Mississippi River, from which—
36 thence N. 5° E., up the Mississippi River and binding therewith (passing the southwesterly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles,) 551 poles & 10 links, to a post northwesterly corner of Nicholas Jarret's survey. No. , claim No. 100, from which a sycamore 36 inches dia. bears S. 21° W. 29 links; thence S. 85° E. with the upper line of the last-mentioned survey 88 poles to the beginning.

JAN'Y 15TH, 1815.

True meridian v. 8° 25′ E. magnetic meridian, by which this survey was made.

A true copy of the original field-notes on file in this office.

W. W. H. LAWTON,
Custodian U. S. Surveys.

(Here follows map marked "Page 36.")

38 *Survey No.* 786.

Plat and description of the survey of a tract of land of 400 acres, situate in township 2 north of the base line, range 10 west of the 3rd principal meridian, in the State of Illinois, executed on the 15th of January, 1815, by Messrs. Rectors, surveyors of private claims in the district of Kaskaskia.

This tract was claimed by the heirs of Pierre Condaire, in right of Pierre Condaire, who claimed, in virtue of actual improvements and cultivation, under the act of Congress of the 3rd of March, 1791, entitled "An act for granting lands to the inhabitants and settlers at Vincennes and the Illinois country, in the Territory Northwest of the Ohio, and for confirming them in their possessions." The claim was recorded as No. 2669, conformably to the provision of the act of Congress of the 26th of March, 1804, entitled "An act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," affirmed by the board of commissioners under the act of Congress of the 20th of February, 1812, entitled "An act for the revision of former confirmations and for confirming certain claims to land in the district of Kaskaskia," and confirmed by the second section of the act of Congress of the 16th April, 1814, entitled "An act confirming certain claims to land in the Illinois Territory, and providing for their location." (See American State Papers, vol. ii, page 615, Duff Green's edition, 1834.)

NOTE.—This tract is with or includes the following surveys, viz:

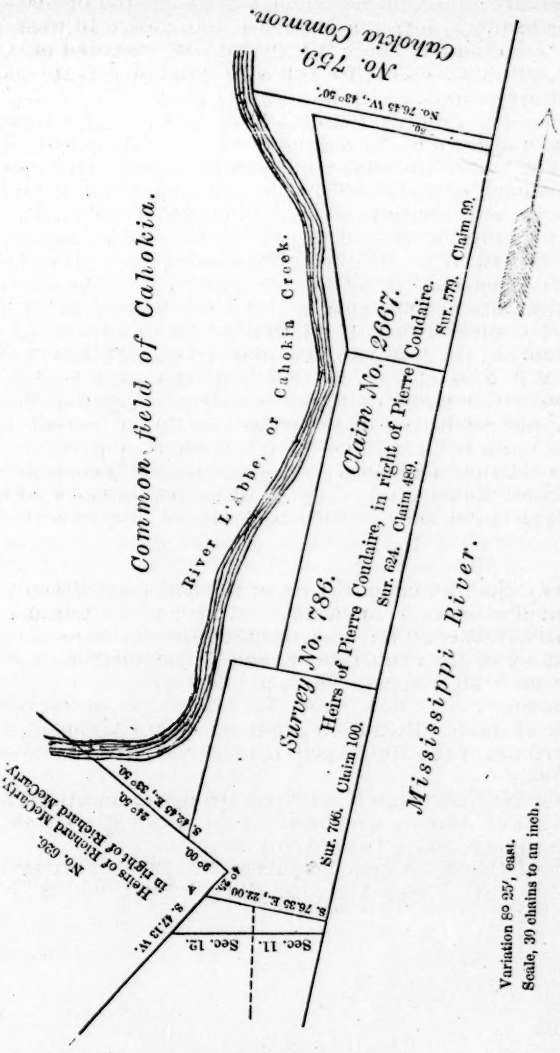
1st. Survey No. 579, claim No. 99, of 100 acres, confirmed to Nicholas Jarrot in right of Jean Dumouchelle by the act of Congress of the 1st of May, 1810, entitled, "An act confirming the decisions of the commissioners in favor of the claimants of land in the district of Kaskaskia." (See American State Papers, vol. ii, p. 141.)

2d. Survey No. 624, claim No. 489, of 100 acres, confirmed to
39 heirs of James Piggot in right of James Wear by the above-recited act of the 16th April, 1814. (See American State Papers, vol. ii, p. 206.)

3d. Survey No. 766, claim No. 100, of 100 acres, confirmed to Nicholas Jarrot in right of Joachin Couillard by the act of the 1st of May. W. 10. (See American State Papers, vol. ii, p. 141.)

4th. Part of Cahokia Common, survey No. 759, confirmed by the act of 1st of May, 1810. (See American State Papers, vol. ii , p. 167.)

T. 2 N., R. 10 W. of 3d p'l M'n.



40 DESCRIPTION.

Beginning at a post in the northwest boundary of survey No. 626, in the name of heirs of Richard McCarty, in right of Richard McCarty, corner to this survey, to survey No. 766, in the name of Nicholas Jarrot, in right of Joachin Couillard, and to fractional section 12, township 2 north, range 10 west, from which a hackberry 6 inches in diameter bears S. 42° 35 E., (551 E.,) 22 links distant, and a honey-locust 3 inches in diameter bears N. 21. 35 W., (N. 30 W.,) 12 links distant.

Thence S. 47.15 W., (S. 38.50 W.) with the northwest boundary of the Richard McCarty survey, which is also a line of the Nicholas Jarrot's survey, 4.25 chains to a post, the west corner of the Richard McCarty survey, and a corner to this and to the Nicholas Jarrot surveys, from which an elm 18 inches in diameter bears S. 33.25 W., (S. 25 W.) 40 links distant.

Thence S. 42.45 E. (S. 51.10 E.) with the southwest boundary of Richard McCarty surveys at 9c.00 a post, corner to the Nicholas Jarrot survey, from which a redbud 6 inches in diameter bears S. 39.35 E., (S. 48 E.,) 10 links distant, and a redbud 6 inches diameter bears S. 66. 35 E., (S. 75 E.,) 16 links distant, and at 33.50 chains a post, on the western and right bank of the river L'Abbe or Cahokia Creek.

Thence down and along the Cahokia Creek S. 82.25 W. (S. 74 W.) 2.25 chains; thence N. 79° 35′ W. (N. 88 W.) 6° 62¼ chains; thence N. 71.35 W. (N. 80 W.) 4.25 chains; thence S. 74° 25′ W. (S. 66 W.) 4.25 chains; thence S. 18.25′ W. (S. 10 W.) 3.25 chains; thence S. 8.25 W. (south) 800 chains; thence S. 13° 25 W, (S. 5 W.) 7.50 chains; 12.50 chains; thence S. 14.35 E. (S. 23 E.) 5.50 chains; thence S. 20.25 thence S. 29.25 W. (S. 21W.) 45.50 chains; thence S. 3.35 E. (S. 12 E.) W. (S. 12 W.) 5.50 chains, to a post in the east boundary of survey No. 579, in the name of Nicholas Jarrot, in right of Jean Dumouchelle, the most northern corner of the Cahokia Common, survey No. 759; thence S. 28.35 E. (S. 37 E.) 22 chains; thence S. 11.35 E.,
41 (S. 20 E.) 13.50 chains to a post, corner to this survey.

Thence No. 76.35 W. (N. 85 W.) 43.50 to a post on the left bank of the Mississippi River, corner to this survey.

Thence up and along the left bank of the Mississippi River, N. 13.25 E. (N. 5′ E.) at 1.50, a point the southwest corner of survey 579, and a corner to the Cahokia Common, survey No. 659, from which a sycamore 20 inches in diameter bears S. 76.35 E., (S. 85 E.,) 2.50 chains distant; and at 137.85 chains a post, in the northwest corner of survey No. 766, and a corner to this survey, and to fractional section 11, from which a sycamore 36 inches in diameter bears S. 29.25 W., (S. 21 W.,) 29 links distant.

Thence S. 76.35′ E. (S. 85 E.) with the north boundary of survey No. 766, 22 chains, to the beginning corner.

OFFICE OF THE U. S. RECORDER OF LAND-TITLES,
St. Louis, March 31, 1868.

This is to certify that the foregoing is correctly copied from pages 335 and 336 of a book entitled "Records of Pr. Surveys in Illinois;" which book is preserved up to this day in this office.

(Signed) FRED'K MOSBERGER,
U. S. Recorder L. T.

[U. S. stamp, 5 c, F. M. March 31, 1868.]

Fee, $10.00.

42 Also, patent of the U. S. for the Condaire claim, dated May 31st, 1848, to wit:

Plat and field-notes of survey 786, *from St. Louis U. S. Land-Office.*

43 The United States of America to all to whom these presents shall come, greeting:

Know ye that there has been deposited in the General Land-Office a certificate, numbered twenty, of the register of the land-office at Kas-

kaskia, Illinois, whereby it appears that by the act of Congress approved on the sixteenth day of April, one thousand eight hundred and fourteen, entitled "An act confirming certain claims to land in the Illinois Territory, and providing for their location," the improvement claim of Pierre Condaire has been confirmed for four hundred acres, being entered as number two thousand six hundred and sixty-seven, in favor of the heirs of P. Condaire, in right of said Pierre Condaire, in the report dated the eighteenth day of January, one thousand eight hundred and thirteen, of Michael Jones, one of the commissioners, at Kaskaskia, Illinois, and which claim, being represented on the connected plat of the Kaskaskia district, is situated in township two north, of range ten west of the third principal meridian, Illinois, and is designated on the township plat of said township as survey number seven hundred and eighty-six, and on the said township plat is represented as lying between Cahokia Creek and the Mississippi, and as including survey number seven hundred and sixty-six, (for claim number one hundred,) survey number six hundred and twenty-four, (for claim number four hundred and eighty-nine,) and survey number five hundred and seventy-nine, (for claim number ninety-nine:)

There is, therefore, granted by the United States unto the said heir of P. Condaire, in right of said Pierre Condaire, or his legal representatives, and to his or their heirs, the tract of land embraced in the aforesaid claim number two thousand six hundred and sixty-seven,
44 and survey number seven hundred and eighty-six as above designated, subject to the claims included in the aforesaid surveys numbers seven hundred and sixty-six, six hundred and twenty-four, and five hundred and seventy-nine, which are excepted and reserved from the transfer by these presents; to have and to hold the tract embraced in the aforesaid claim number two thousand six hundred and sixty-seven and survey number seven hundred and eighty-six, with the appurtenances, unto the said heir of Pierre Condaire, in right of said Pierre Condaire or his legal representatives, and to his or their heirs and assigns forever, with the said exception and reservation of the aforesaid surveys number seven hundred and sixty-six, six hundred and twenty-four, and five hundred and seventy-nine.

In testimony whereof I, James K. Polk, President of the United States, have caused these letters to be made patent and the seal of the General Land-Offices to be hereunto affixed. Given under my hand at the city of Washington, the thirty-first day of May, in the year of our Lord one thousand eight hundred and forty-eight, and of the Independence of the United States the seventy-second.

By the President:

JAMES K. POLK,

[SEAL.] By J. K. STEPHENS, *Asst. Sec'y.*

S. H. LAUGHLIN,

Recorder of the General Land-Office.

Recorded vol. 10, pages 207, 208, 209.

Also the Jarrot patent, dated May 1st, 1848.

45 The United States of America to all to whom these presents shall come, greeting:

Know ye that there has been deposited in the General Land-Office a duplicate certificate, numbered two hundred and twelve, of the register of the land-office at Kaskaskia, Illinois, whereby it appears that by the

act of Congress approved on the first day of May, one thousand eight hundred and ten, entitled "An act confirming the decisions of the commissioners in favor of the claimants of land in the district of Kaskaskia," the claim of Nich's Jarrot, in right of Jean Dumochell, has been confirmed for one hundred acres, being the militia claim of said Jean Dumochell, which claim is entered as number ninety-nine in the report, dated the thirty-first day of December, one thousand eight hundred and nine, of the Kaskaskia commissioners, and has been designated as survey number five hundred and seventy-nine on the connected plat of the district of Kaskaskia, as returned by the surveyor-general, and is situated in township two north, of range ten west of the third principal meridian, Illinois.

There is, therefore, granted by the United States unto the said Nichl. Jarrot, in right of said Jean Dumochell, or to his legal representatives, and to his or their heirs, the tract of land above described, to have and to hold the said tract, with the appurtenances, unto the said Nichl. Jarrot, in right of said Jean Dumochell, or his legal representatives, and to his or their heirs and assigns forever.

In testimony whereof I, James K. Polk, President of the United States, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed. Given under my hand at the city of Washington, the thirty-first day of May, in the year
46 of our Lord one thousand eight hundred and forty-eight, and of the Independence of the United States the seventy-second.

By the President:

[L. S.]

JAMES K. POLK,
By J. K. STEPHENS, *Asst. Sec'y.*
S. H. LAUGHLIN,
Recorder of the General Land-Office.

Recorded vol. 10, page 211, 212. Exd.

Also, two United States patents to Samuel Wiggins, for Bloody Island, both dated June 9th, 1825. One is for fractional section 11, township 2 north, range 10 west, containing $128\frac{86}{100}$ acres. The other is fractional section 2, township 2 north, range 10 west, containing $3\frac{47}{100}$ acres.

Also, a plat of Bloody Island and the contiguous lands, taken from the custodian of the U. S. surveys.

[Here follows map, marked page 46.]

47 Col. VITAL JARROT, being duly sworn, testified as follows:

(Hilgard's plat is here shown witness.) I find the tract of land described in the declaration. The first ferry division does not show on this map. I know the land in controversy. I was born and raised in that neighborhood. I know there is a large accretion formed there. I don't know exactly when it first commenced forming. Before that accretion formed the west bank of those surveys had been washed in by the Mississippi. I cannot fix the time the accretions commenced forming there. It was a matter that didn't concern me. It was a number of years ago, though there were various changes took place in the river at different periods, and at what time accretions commenced forming there I cannot fix in my memory.

At one time it was a mooted question whether the main channel was on the west or east side of the island. The boats, though, continual,

plied on the west side, though there was a great deal of the water on this side of the island. I think there was occasionally boats passed up on the east side of the island. I think I heard them coming up there, not as the channel, but on business. Illinoistown was only a small place then. I recollect the changes on the island from time to time. From my first observation of that island, it had a tendency to wash away at the head of the island and form at the foot. I noticed it before the dyke was built. There was frequently large sand-bars at the east and south of the island. In low water it extended considerably down. For years it kept increasing on the east and south. As the river made inroads on the main shore the island kept filling up on the east side correspondingly. The greatest change took place in '51. The stone that had been put there to protect the main shore in '51—in the flood the water washed around that pier and cut across into the claim above that. I be-
48 lieve it cut nearly clear across—within a few feet of clear across that claim. Since that the sand has been accumulating there. The first thing that protected the island on the west side from washing away was the stone breakwater that was put there by the Government of the U. S. Some of that was above the island, up at Brooklin, and some at the island. The next was the riveting the shore by the ferry co., lining the west side with stone. They deposited stone there.

Q. Have you any idea of the expenses that was incurred?

(Objected to. Objection sustained.)

The riveting the shore protected the shore; kept the water in certain bounds. The island forms a continuous sand-bar now clear down to the Pittsburg coal-dyke. There is something separating this part of the island from the mainland. The Cahokia Creek at this time has no outlet at all; it runs the most of the year, but at this time there is no water at all down there. It runs down to the southern line of the survey and stops. There is not a drop of water communicating with the Mississippi—there has not for a month or so. The creek has been dammed. I judge that there was about a month ago a little more. It used to run down to Cahokia. The Cahokia Creek was turned above, as on Hilgard's plat, in '51. It meandered through the sand-bar; in fact, some of it run clear up north sometimes. It used to run down by Cahokia, and the flood of '51 cut almost entirely across that survey. The creek turned there into the bar and meandered through it. It is not properly laid down here. Here is a turn so very abrupt that the creek runs almost due north right in here. Before the Illinois and St. Louis Coal Company had put in their dyke there, it used to run down below
49 there. They threw some obstructions up there to keep it from running down there, and turned it through that sand-bar up above there, and the ferry co., to get rid of it, threw in some obstructions and threw it back into the same channel where it run before. There is not sufficient water to run over their dam, and the consequence is it is a pond and has no outlet.

(Defendants' counsel then introduced a deed in fee-simple from Joseph Condaire to N. Jarrot, dated the 17th of April, 1809, purporting to convey said Condaire claim, and describing said Joseph Condaire as the sole heir of said Pierre Condaire, duly acknowledged and recorded; also, the last will and testament of said Nicholas Jarrot, duly proved in the county court of said county on the 18th of December, 1820, and translated in 2 Gil., Ill. R., pp. 135 to 137, inclusive, giving Julia Jarrot, his widow and executrix, authority to sell his real estate at her discretion; also, a deed in fee-simple from said Julia Jarrot under said will to Samuel Wiggins for the land patented to said Jarrot as aforesaid, and for said Condaire claim and survey, dated July 13th, 1822.)

Cross-examination of Col. Vital Jarrot:

I was shown this plat (Hilgard's plat.) I noticed the western line of survey 579. I don't recollect that I ever examined the field-notes of this survey called the Jarrot survey. This is a straight line, as far as I see from this plat. The first formation that was noticed in front of those old surveys were formed south and east of Bloody Island and joining it. At my first observation of it, there was no sand-bars independent of Bloody Island.

50 (Witness is here shown the largest and most painted map.) That which is marked yellow is surveyed as being those new formations. The U. S. has never surveyed those sand-bars, that I know of. I see what the map intends to convey, that that was the old line, (pointing.) I suppose what is colored green here, intending to indicate the bank of the river as it was about the time this dyke was made, leaving only fractions of those surveys, the balance being washed away by the river, is nearly correct. There are pools of water along here on the foot of Bloody Island—no running water. The Cahokia Creek runs through it. The Cahokia Creek is not marked correctly on this map. The pond or lake in ordinary stages of water is above here, (pointing on the map,) and here is the creek. Before these formations were made the river run in a sweeping, rounding direction; it come around in a kind of half moon. I don't think it was exactly as it is represented here by this green line. Not all of this before it was filled up was the Mississippi River. As late as '54 no boats could run here. Perhaps this filling up was localized in a great measure by the dykes, but the filling up was going on. As the river made in next the Illinois bank the island enlarged correspondingly. If the dyke had not been built the river would have had all of East St. Louis before this time. I don't know the extent of the Lovingston tract. I understood he had a lease below on that sand-bar. I don't know how many acres; I could give but a mere guess. I never saw this lease, and I don't know the extent of it. I know he had a cabin down on the sand-bar, and I understood he had a lease.

51 Plaintiff's counsel wishes to establish the of the value of the tract only for the purpose of bringing it within the jurisdiction of the U. S. Supreme Court.

(Deft.' counsel objects, and says that can be shown by affidavit. The court sustains the objection.)

Redirect examination:

I pointed out a slough as the west boundary of this Jarrot tract. I have looked at the field-notes of the Condaire tract.

Q. State to the jury what is the west boundary of that tract.

(Objected to. The court allows the question to be asked if it was forgotten in the direct examination.)

A. The field-notes bound it by the river.

(Objected to.)

Q. How are all these U. S. surveys up and down the bounded generally?

(Objected to. The court confines the examination to the land in question.)

The field-notes makes the river the western boundary. Part of the Condaire claim is now on the island—what we call the island. There was somewhere about 100 acres outside of those three claims. The Condaire claim covers the other claims, and the notes don't regard the divisions. The notes gave all of 300 acres. The portions that are not covered by these claims amount to about 100 acres. All these lands in controversy lie west of the Condaire tract.

Recross-examination:

52 (Witness is shown paper marked "1.") This Condaire tract covers most of the other claims. I could not tell whether the western line, as indicated on the field-notes of the Jarrot tract, are precisely the same as the Condaire tract. The Condaire claim tells you binding with the river. Notwithstanding the notes go from one point to another, it says "binding therewith." One says beginning at the bank of the Mississippi River, and another begins at the corner. These don't begin at the same place; they may correspond, but this begins away from the river and runs the other way. It possibly may be the same, possibly exactly. One begins at one corner and the other at another.

Defendants' counsel read in evidence the original deed from Samuel Wiggins and wife, to O'Fallon and others, dated August 1st, 1831, for the land on Bloody Island and the Condaire and Jarrot claims and surveys.

Also, private laws of 1853, page 193, dated Feby. 11th, 1853.

Also, proceedings of the St. Clair circuit court, by which the property was sold by the master in chancery.

Also, deed made by the special master on the 1st of December, 1857, embracing and conveying this land on this side of the river and the ferry franchise to the Wiggins Ferry Company.

Offers also private laws of '67, volume I, page 938.

53 Col. VITAL JARROT recalled:

I find a discrepancy. It is this: When it comes down here near the river, in this that you got from Springfield, it strikes the river; thence up the river, placing the southwesterly corner of the Jarrot survey at six poles; whereas taking that first data of six poles, it is only 166 poles from that point to the upper one, whereas I make it 550. There is that discrepancy. There is a mistake here somewhere, because if you take the southwesterly corner to be only six poles, then running the length of this Jarrot survey 160 poles, you have but 166, whereas this makes it 550. If either of these is correct, they don't agree. I have not a survey above here to which it might refer. It says "the last-mentioned survey," it makes the two points the same. It says "passing the southwesterly corner and the northwesterly corner." The intervening space it don't say anything about. There is some omission, I suppose, that makes it unintelligible.

It seems that this upper claim and the lower one are both called Jarrot claims. That is what makes the discrepancy. By taking the length of the three claims, it makes that distance right. It makes it as to the distance, but they mention it on the notes as the above-mentioned survey. 551 would *would* make the length of these three surveys.

I never was a real surveyor. I have surveyed some for my own use. I have not surveyed any for a good many years. I have no compass now. Some years ago I used to survey some for my neighbors and myself—those bottom lands. I don't say that the boundaries are the same, but they start the same and come out the same. In these three surveys

54 there is nothing said about binding the river, if I recollect right, and there might be some pieces of land left between those claims and the river which the Condaire claim would cover. It is very possible there was. It is not likely the river was so straight that they could run each of those three tracts its whole length straight and follow the river; the river was not that straight.

Defendants close, and this was all the evidence in the case.

The court, sitting as a jury, by consent of parties upon this evidence found a verdict for defendants; whereupon the plaintiff entered a motion for a new trial, because the court found against the law and the evidence of the case; which motion the court overruled, and the plaintiff at the time excepted to the overruling of the said motion, and the court entered judgment for the said defendants; and the said plaintiffs pray that this bill of exceptions may be signed, sealed, and made part of the record of this cause.

WM. H. SNYDER. [SEAL.]

Be it remembered that on the 15th day of April, 1874, the following bond was filed, to wit:

Know all men by these presents that we, the county of St. Clair, Charles L. Emmerich, chairman of the board of county commissioners of St. Clair County, Illinois, and Frederick H. Pieper, of the county of St. Clair, and State of Illinois, are held and firmly bound unto John B. Lovingston and the Wiggins Ferry Company in the penal sum of two hundred dollars, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed
55 with our seals and dated at Belleville this 15th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

The condition of the above obligation is such that, whereas the said John B. Lovingston and the Wiggins Ferry Company did, to wit, on the 19th day of January, one thousand eight hundred and seventy-four, at a term of the St. Clair circuit court, then being holden within and for the county of St. Clair, in the county of St. Clair, and State of Illinois, obtain a judgment against the said county of St. Clair for costs of suit in an action of ejectment, from which judgment the said county of St. Clair has prayed for and obtained an appeal to the supreme court of said State:

Now if the said county of St. Clair shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment, costs, interests, and damages rendered and to be rendered against the said county of St. Clair, in case the said judgment shall be affirmed in the said supreme court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

{SEAL OF THE COUNTY COURT OF ST. CLAIR COUNTY, ILLINOIS.}

THE COUNTY OF ST. CLAIR by
C. L. EMMERICH, [SEAL.]
Chairman of the Board of County Commissioners.
F. H. PIEPER. [SEAL.]
LOUIS C. STARKEL, [SEAL.]
County Clerk.

Approved by me this 15th day of April, A. D., 1874.
CHAS. BECKER, *Clerk*,
By GEO. H. STOLBERG, *Dpy.*

56 STATE OF ILLINOIS,
St. Clair County, ss:

I, Charles Becker, clerk of the circuit court of St. Clair County, in the State aforesaid, do hereby certify the above & foregoing to be a true and correct copy of the bill, summons, plea, all the orders of court, bill

of excepions, and appeal bond in a certain cause lately pending in said court on the law side thereof, wherein the co. of St. Clair is plff. and John B. Lovingston and The Wiggins Ferry Co. are defts.

SAAL OF ST. CLAIR COUNTY CIRCUIT COURT, ILLS.

In witness whereof I have hereunto set my hand, and affixed the seal of said court. at Belleville, this 30th day of April, A. D. 1874.

CHARLES BECKER, *Clerk.*

57 Supreme court of Illinois, southern grand division, June term, 1874.

And now comes the said appellant, the county of St. Clair, by G. Koerner, its atty., and says that there is manifest error in the record and proceedings of the within record, and assigns for error:

That the court found a verdict against law & evidence; that the court overruled the motion for a new trial.

That the court rendered judgment for defendant instead of rendering it for plaintiff.

That there are other errors. Wherefore the said appellant prays judgment of this court that the judgment of the circuit court be reversed for the errors aforesaid.

GUSTAVUS KOERNER.

June 2, 1874.

In nullo est erratum.

WM. H. UNDERWOOD,
Atty. for Appellee.

58 At a supreme court of the State of Illinois begun and held at Mount Vernon, within and for the southern grand division of said State, on Tuesday, the second day of June, in the year of our Lord one thousand eight hundred and seventy-four, to wit, on Friday, June 12th, A. D. 1874.

Present, Hon. Pinkney H. Walker, chief-justice.
" " Sidney Breese, associate "
" " John M. Scott, " "
" " Wm. K. McAllister, " "
" " Benj. R. Sheldon, " "
" " John Scholfield, " "
" " Alfred M. Craig, " "

Joseph B. Goodrich, sheriff; R. A. D. Wilbanks, clerk.

COUNTY OF ST. CLAIR *vs.* JOHN B. LOVINGSTON ET AL. } Appeal from St. Clair.

On this day comes the said parties, by their respective attornies, and the court, proceeding with the call of the docket, takes this cause under advisement.

MONDAY, *June 15th, A. D.* 1874.

COUNTY OF ST. CLAIR, APPELLANT, *vs.* JOHN B. LOVINGSTON AND THE WIGGINS Ferry Company, appellees. } Appeal from St. Clair.

59 On this day came again the said parties, and the court having

diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error: Therefore, it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellees recover of and from the said appellant costs by them in this behalf expended, and that they have execution therefor.

60 STATE OF ILLINOIS, *ss:*

I, R. A. D. Wilbanks, clerk of the supreme court of the State of Illinois within and for the southern grand division of said State, do hereby certify the foregoing to be true, complete, and perfect copies of the record of the circuit court as filed in my office, and of the orders of the supreme court of said State as the same appears of record in my office in the foregoing styled cause.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Mount Vernon, this 29th day of July, A. D. 1874.

[SEAL.] R. A. D. WILBANKS,
Clerk of the Supreme Court.

61 STATE OF ILLINOIS, *St. Clair Co.:*

I, G. Koerner, being first duly sworn, depose & say that the land in question in the case of The County of St. Clair, Ill., vs. J. B. Lovingston & al., and which case has been decided against said party by the supreme court of the State of Illinois, and which is about to be taken to the Supreme Court of the United States on a writ of error, is of the value of more than two thousand dollars, and the title of said land is the question between the said County of St. Clair & the said Livingston & als.

GUSTAVUS KOERNER.

Subscribed and sworn to before me this 9th day of September, A. D. 1874.

[NOTARIAL SEAL.] LUCIUS D. TURNER, JR., *N. P.*

62 Opinion of the supreme court of the State of Illinois, at a term thereof begun and held at Mount Vernon on Tuesday, the fourth day of June, in the year of our Lord one thousand eight hundred and seventy-two, within and for the southern grand division of said State.

Present, Charles B. Lawrence, chief-justice; Pinkney H. Walker, associate justice; Sidney Breese, associate justice; Anthony Thornton, associate justice; John M. Scott, associate justice; Benjamin R. Sheldon, associate justice; William K. McAllister, associate justice.

LOVINGSTON AND WIGGINS FERRY CO.
vs.
THE COUNTY OF ST. CLAIR.

Opinion by Mr. Justice Thornton.

If the land of the riparian proprietor was bounded by the Mississippi,

his right to the possession and enjoyment of the alluvion is not affected, whether the stream be navigable or not. By the common law alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.

The navigability of the stream, as the term is used at common law, has no applicability to this case. If commerce had been obstructed, or the public easement interrupted, or a question was to arise as to the ownership of the bed of the stream, then the enquiry as to whether
63 the stream was navigable or not, in the sense of the common law, might be pertinent. No such question is presented. On this branch of the case the only question is: Have the United States, or the State, or the riparian owner the right to the accretion?

If the river is the boundary, the alluvion, as fast as it forms, becomes the property of the owner of the adjacent land to which it is attached. On a great public highway like the Mississippi, floating an immense commerce and bearing it to every part of the globe, purchasers must have obtained lands for the beneficial use of the river as well as for the land. Can it be presumed that the United States would make grants of lands bordering upon this river, with its turbulent current, and subject to constant change in its banks by alluvion upon the one side and avulsion upon the other, and then claim all accretion formed by the gradual deposition of sand and soil, and deprive the grantee of his river front? If he should lose his entire grant by the washing of the river he must bear the loss, and he should be permitted to enjoy any gain which the ever-varying channel may bring to him. If a great government were to undertake under such circumstances to dispossess its grantee of his river front, the attempt would be akin to fraud, and it would lose the respect to which beneficent laws and the protection of the citizen would entitle it.

We then assume that the act of Congress of 1796, (1 Stat., 468, sec. 9,) which declares all navigable rivers in a certain district public highways, has no bearing upon the question to be considered. The riparian owner has a right to the alluvion, whether the stream be navigable or unnavigable.

Blackstone says (2 book, 262) as to lands gained from the sea by alluvion, where the gain is by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. "For de minimis
64 non cervat lex; and besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss."

The same reasoning applies, with all its force, to the lands abutting upon the Mississippi River.

In Middleton vs. Pritchard, 3 Scam., 510, this court said: All alluvions belong to the riparian proprietor, both by the common and civil law.

In the case of The King vs. Lord Yarborough, 3 Barn. and Cress., 91, land gained from the sea by alluvion, or projection of extraneous matter, whereby the sea was excluded and prevented from overflowing it, was adjudged to be parcel of the demesne lands of the adjacent manor.

This question has been discussed with profound research and great ability by the courts in Louisiana, as to accretions upon this same river, and the law clearly announced. In Municipality No. 2 vs. Orleans Cotton Press, 18 Louisiana, 122, it was declared that the right to future alluvial formations was a right inherent in the property, an essential

attribute of it, the result of natural law, in consequence of the local situation of the land; that cities, as well as individuals, had the right to acquire it, pene alluvionis, as riparian proprietor; and that the right was founded in justice, both on account of the risks to which the land was exposed and the burden of protecting the estate. The court further assimilated the right to the right of the owner of land to the fruits of a tree growing thereon, and said: "Such an attempt to transfer from the owner of the land to the city the future increase of alluvion, would be as legally absurd as if the legislature had declared that after the incorporation of the city the fruits of all the orange-trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens."

The same principle was declared in Banks vs. Ogden, 2 Wal. U. S. 57, as applicable to Lake Michigan.

65 See, also, The Mayor, &c., of New Orleans vs. The United States, 10 Peters, 662; Jones vs. Loulard, 24 How. U. S., 41.

The same doctrine is fully declared in a recent case, Warren vs. Chambers, 25 Ark., 120.

To determine the title to the accretion we must ascertain the locality of the land of the adjacent owner. We need not enter upon a discussion of the laws of Congress, and of the State, by virtue of which the county claims title, if the land previously granted by the United States was bounded by the river, and the accretion is attached to it.

Hilgard, the surveyor, testified that the accretion was all west of the Condaine tract. The only portion of the field-notes we desire to call attention to is the following: "To a post on the westerly side of the river L. Abbe, or Cahokia Creek, thence down the said river or creek with the different courses thereof," and "thence N. 85. deg. W. 174 poles, to a post on the bank of the Mississippi River; from which thence N. 5 deg. E., up the Mississippi River and bounding therewith, (passing the southwesterly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles,) 551 poles and ten links, to a post northwesterly corner of Nicholas Jarrot's survey No. —, claim No. 100." This survey was made in 1815. From the copy of the plat of it, from the custodian of the United States surveys, it will be seen that the line along Cahokia Creek meanders with the stream, which was sinuous, and hence the call in the notes, "down the said creek, with the different courses thereof." A further examination of the plat will show that though the line from "a post on the bank of the Mississippi River to a post northwesterly, corner of Nicholas Jarrot's survey, claim No. 100," is a straight line, the river bank as indicated by the plat was also straight in 1815. The Condaine survey embraces three militia claims which had been surveyed before, and which were confirmed to Jarrot.

66 One of the Jarrot surveys begins on the bank of the Mississippi, and thence to a point in the river, &c.

The defendant' traced title from patents confirmatory of these several surveys, and they also proved title to "Bloody Island," which, when surveyed in 1824, was three-fourths of a mile north of the tract in controversy.

In behalf of the county it is assumed that the patent to survey 579 contains no indication that the river is the boundary; that the west line of the Condaine claim—being the line next to the river—is identical with the west line of the militia claims; that Condaine took no portion of the militia claims, but only the fractions east of them and between them and Cahokia Creek; that the lands granted were bounded by specific lines, and not by the river, and therefore the grants are lim-

ited grants, and the land in dispute is outside of their boundary-lines.

Concede that the Jarrot survey did not make the river the boundary by specific call, yet its beginning was on the bank of the river opposite St. Louis, and thence it followed the river to a point on it. Hilgard testified that this survey was on the old bank of the river. It is, then, evident that at this time, which was some years prior to the Condaine survey, there was no land between the western line of the Jarrot survey and the river. All the plats introduced in evidence show that the river bank was straight, and the point in the river must have been made for the purpose of obtaining the bearing of the witness tree, a sycamore 250 links from the point. It is manifest that the river was the boundary, and whether the grant was bounded by the river or on the river can make no difference as to the question involved. The grant may be so limited as not to carry it to the middle of the river, and yet not exclude the right to the alluvion.

A large number of cases have been cited by one of the counsel for the county to establish that a grant is not carried to the center of a
67 stream, but stops at the bank, if the granter describes the line as upon the margin, or at the edge or shore, and that these terms become monuments, and that they indicate an intention to stop at the edge or margin of the river. This may be good law, and not affect the rights of the defendants. They do not claim the bed of the stream, and the proof shows that the river does not run over the land in dispute at ordinary stages of water. Their claim, if established, does not obstruct the river, or interfere with its free navigation and use by the public.

But the Condaine survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any fractions between the Jarrot surveys and Cahokia Creek, but the land, if any, between their western line and the river. The Condaine survey run up the river and binding, and passed the southwesterly corner of the Jarrot survey, No. 579, at six poles. Language could not make it more plain, that the western line was bounded by the river, and the plats confirm this view.

The only construction to be given to these grants is, that the United States had conveyed the land to the bank of the Mississippi. It follows that the grantees were riparian proprietors, and are the owners of the alluvial formations attached to their lands.

Unless such construction be given and adhered to rigidly, almost endless litigation must ensue from the frequent changes in the current of the Mississippi and the continual deposits upon one or the other of its banks; the value of land upon its borders would depreciate, and the prosperity of its beautiful towns and cities would be seriously impaired.

Counsel say, at the time the locations were made there was no advantage of river-front, no wharfage, and no wood-yards. This may be true, but even at this early period the grantees must have realized the vast importance of the Mississippi to them, and to all the people of the States bordering upon it, in the grand future soon to be unfolded. They must have seen the necessity, and accepted the grants, for the purpose of securing an approach to the river.

68 From the proof, before 1819 a ferry was established across the river, near to the land in dispute, and has been since in constant operation. Before the grant of the swamp and overflowed lands to the State in 1850, a city had sprung up on the Missouri side of the river, and a prosperous village was growing on the Illinois shore. Before the survey by the county of the swamp-lands, in 1852, a charter for a railroad had been granted by the State, which resulted in the construction

of a road from Terre Haute, in the State of Indiana, to Illinoistown. Prior to the grant made by the United States in 1870, as shown by the plat offered in evidence, a number of railroad tracks had been constructed upon the ground formed by accretion, and an elevator erected, and dykes for the use of wagons, and a large expenditure of money made by the ferry company for the preservation of the banks recently made.

It needed no prophetic eye to foresee, prior to the year 1850, these grand improvements which bring the products of an empire to the Father of Waters. Their absolute necessity, and consequent construction, as an outlet for our immense produce had been known for more than a quarter of a century before their completion. Their usefulness would be greatly crippled, and the public thereby seriously suffer if ready access to the river was denied.

It would be a strained construction to hold that, in making these grants, the United States reserved all accretions, and thus to deprive these proprietors of ferry-privileges and the beneficial enjoyment of the river.

It is further contended that the lands are not accretions, as they were made by artificial and not natural means. It is not at all certain, from the proof, that the accretions were entirely the result of artificial
69 structures, or that they would not have been formed without them.

The construction of coal-dykes facilitated the formation, and the soil was prevented from washing away, by the expenditure of money by the ferry company.

Jonathan Moore, who had known the river since 1813, testified that the accretions had commenced to form before the construction of the dykes, and McClintock and Jarrot testified to the same effect.

Concede, however, that the dykes, to some extent, caused the accretions. They were not constructed for such purpose; and appellants had nothing to do with their erection. They were built for the accomodation of the public and to secure an approach to the ferry-boats; and the city of St. Louis did some work to preserve its harbor. Improvements were also made by the United States to throw the channel of the river towards the city.

The fact that the labor of other persons changed the current of the river, and caused the deposit of alluvion upon the land of appellants, cannot deprive them of a right to the newly-made soil.

Chancellor Kent, after declaring the common-law doctrine, that grants of land bounded on the margins of rivers carry the exclusive right of the grantee to the center of the stream, unless there is a clear intention to stop at the edge, says: "The proprietors of the adjoining banks have the right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement; and neither the State nor any other individual, has the right to divert the stream and render it less useful to the owners of the soil." (3 vol. Com., 427.)

70 If portions of soil were added to real estate already possessed by gradual deposition, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another, without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the State nor any other individual can divert the water from him, artificial structures, which cause deposits between the old

and new bank, should not divest him of the use of the water. Otherwise ferry and wharf privileges might be utterly destroyed, and towns and cities, built with sole reference to the use and enjoyment of the river, might be entirely separated from it.

In Godfrey vs. The City of Alton, 12 Ill., 29, the public landing had been enlarged and extended into the river, both by natural and artificial means, and this court held that the accretions attached to, and formed a part of the landing.

In New Orleans vs. The United States, 10 Peters, 662, the quay had been enlarged by levees constructed by the city, to prevent the inundation of the water, and the court held that this did not impair the rights of the city to the quay.

In Jones vs. Loulard, supra., the intervening channel between the island and the Missouri shore had been filled up in consequence of dykes constructed by the city, and the riparian owner succeeded.

In the case at bar the accretions have not been sudden, but gradual, as we gather from the testimony. The city of St. Louis, to preserve its harbor and to prevent the channel from leaving the Missouri shore, threw rock into the river, and the coal-dykes were made to afford
71 access to boats engaged in carrying across the river. The ferry company protected such accretions by an expenditure of labor and money.

The accretions, then, are partly the result of natural causes, and structures and work erected and performed for the good of the public. Appellants should not thereby lose their frontage on the river, and be debarred of valuable rights heretofore enjoyed. This would be a grievous wrong, for which there would be no adequate redress.

The judgment of the circuit court is reversed, and the cause remanded.

Reversed.

I, R. A. D. Wilbanks, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Mount Vernon, this eleventh day of February, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] R. A. D. WILBANKS,
Clerk of the Supreme Court.

(Indorsed:) 35. Supreme court of the State of Illinois, southern grand division. Certified copy of opinion. Appeal from St. Clair County. Hon. Anthony Thornton, justice. Livingston and Wiggins Ferry Co., vs. The County of St. Clair. R. A. D. Wilbanks, clerk supreme court.

72 Supreme Court of the United States, October term, 1874.

COUNTY OF ST. CLAIR, PLTFF. IN ERROR,
vs.
LOVINGSTON & OTHERS, DEFENDANTS IN ERROR.

And now comes the County of St. Clair, by Gustave Koerner & Lewis Hanks, its attorneys, & says there is manifest error in the record & proceedings in the above case, in this—

1. That the supreme court of the State of Illinois affirmed the judgment of the court below.

2. That the said supreme court decided against the grant made by the United States of the land in question to the said plaintiff in error, the said grant being made by an act of Congress.

3. That the said supreme court decided that the defendants, as owners of certain militia claims, each by law containing one hundred acres, and which claims were actually surveyed & bounded by well-ascertained lines, were entitled to the accretions made thereon on the Missis-
73 sippi River, which are some of the lands granted by the *the* United States to the plaintiff in error.

4. That the said supreme court decided against said grant to the said County of St. Clair, in holding that a certain tract of land heretofore patented to the United States as an island and as fractional sections under the United States survey was entitled to accretions, not on the river-front and towards the river, but to accretions above and below or on the foot and the head of the said island, thereby annulling the grant made by the United States to the plaintiff in error, below & above said island; therefore the said plaintiff in error prays this court to reverse the said judgment of the supreme court of Illinois, and to order the said supreme court to reverse the judgment of the circuit court & to remand the case to the circuit court, to be tried according to the opinion of this court.

G. KOERNER & L. HANKS,
For Plff. in Error.

74 (Indorsed:) United States of America, seventh circuit. On this record writ of error is allowed, & citation ordered to issue, & bond approved. Sept'r 7, 1874.

D. DAVIS,
Asso. Just. S. C. U. S.

75 In the supreme court of Illinois, southern grand division, June term, 1874.

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND THE WIGGINS FERRY Company. } Appeal from St. Clair.

It is hereby certified that, on the hearing of the above-entitled cause before the supreme court of Illinois, the appellant, the County of St. Clair, claimed the land in question under and by virtue of an act of Congress entitled "An act to confirm certain lands in Illinois," approved July 15, 1870, and an act amendatory thereto, approved February 18, 1871, and did rely on said acts as source of title to said lands. That the validity of said title under said acts was drawn in question by the appellees, Lovingston and the Wiggins Ferry Company, and that this court decided in favor of said appellees, and that said acts conveyed no title to the County of St. Clair as to the said lands; that this decision was on the merits of the case, and, if not reversed by the Supreme Court of the United States, does finally settle the title to said lands as to the county of St. Clair, and is therefore a final decision as to the merits of the case, and establishes the invalidity of the title claimed under said acts as to any lands purporting to be conveyed thereby to the said County of St. Clair against the title claimed by the Wiggins Ferry Company and Lovingston under a prior grant.

P. H. WALKER,
Chief-Justice of the Supreme Court of Illinois.

76 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The County of St. Clear, appellant, and John B. Lovingston and The Wiggins Ferry Company, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in
77 favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statue of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

VIII.

78 The United States of America, to John B. Lovingston and the Wiggins Ferry Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein the County of St. Clear is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David Davis, associate justice of the Supreme

Court of the United States, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

79 STATE OF ILLINOIS, *St. Clair County, ss:*

I, W. H. Underwood, counsellor and attorney at law, hereby acknowledge service of the within citation, for and on behalf of the defendants in error, and enter my appearance for the same.

Octob' 10, 1874.

WM. H. UNDERWOOD,
Atty. for Defts.

80 STATE OF ILLINOIS,
St. Clair County, ss:

Know all men by these presents that we, the County of St. Clair, as principal, and T. H. Pieper, as security, are held and firmly bound unto John B. Lovingston and the Wiggins Ferry Company, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In testimony whereof the County of St. Clair has caused these presents to be signed by the presiding judge of the county court of St. Clair County, Illinois, and to be attested by the clerk of said court, and the seal of the said county to be hereunto affixed; and the said C. L. Emmerick, chairman of county board, and T. H. Piper have hereunto set their hands and seals this fourth day of September, A. D. 1874.

The condition of the above obligation is such, that whereas an appeal had been taken by the County of St. Clair from a judgement of the circuit court of St. Clair County, Illinois, to the supreme court of the State of Illinois, the same being the highest court of the State of Illinois, and a court of the last resort, which said judgement had been rendered in an action of ejectment in favor of the said Lovingston and the Wiggins Ferry Company, and against said County of St. Clair; and whereas

81 at the June term of said supreme court, A. D. 1874, in the southern grand division, at Mount Vernon, Illinois, the said supreme court affirmed said judgement of the circuit court of St. Clair County, and rendered judgment for costs against the said County of St. Clair; and it appearing from the record, as well as from the certificate of the chief-justice of the said supreme court of Illinois, that, in deciding the said cause, there was drawn in question the validity of a law of Congress, and that the decision of said supreme court was against the validity of said law; and whereas the said County of St. Clair has applied for a writ of error from the Supreme Court of the United States to the said supreme court of Illinois, and which writ has been allowed by the honorable David Davis, one of the associate justices of the Supreme Court of the United States; and whereas a citation is about to be issued in the above case:

Now, if the said County of St. Clair and
shall duly prosecute said writ of error, and shall pay all costs and damages which, upon the affirmance of said judgement of said supreme court of Illinois by the Supreme Court of the United States, may be adjudged to the respondent in error, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE COUNTY OF ST. CLAIR,
[SEAL OF ST. CLAIR CO.] (Sig.) By C. L. EMMERICK, [SEAL.]
Chairman of County Board.

(Sig.) T. H. PIPER. [SEAL.]

82 STATE OF ILLINOIS,
St. Clair County, ss:

I, Louis C. Starkel, clerk of the county court of St. Clair County, Illinois, do hereby certify that Hon. Chas. L. Emmerick, at the time of signing this bond, was the chairman of the county board of St. Clair County, Illinois, duly elected and qualified, and that the seal of the county annexed to said bond is the official seal of said county in my custody, and was set there by order of the county court.

Witness my hand and official seal this 4th day of September, A. D. 1874.

[SEAL OF ST. CLAIR CO.] (Sig.) LOUIS C. STARKLE,
Clerk of County Court.

Bond approved Sept. 7, 1874.

DAVID DAVIS,
Associate Just. S. C.

I, R. A. D. Wilbanks, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the bond for costs in the cause entitled County of St. Clair vs. John B. Lovingston et al., of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court this 21st day of September, in the year of our Lord one thousand eight hundred & seventy-four.

[SEAL.] R. A. D. WILBANKS,
Clerk of the Supreme Court.

VI.

(Indorsement on cover:) No. 608. The County of St. Clair, plaintiff in error, vs. John B. Lovingston and the Wiggins Ferry Company. Illinois sup. court. Filed 14th October, 1874.

Supreme Court of the United States.

OCTOBER TERM 1874.

THE COUNTY OF ST. CLAIR, *Plaintiff in error*,

vs.

JOHN B. LOVINGSTON, et al., *Defendants in error.*

ERROR TO SUPREME COURT OF ILLINOIS.

Abstract, Brief and Argument

OF

GUSTAVUS KOERNER,

FOR

Plaintiff in error.

BELLEVILLE, ILL.,
"STERN DES WESTENS" STEAM PRINTING ESTABLISHMENT.
1874.

Supreme Court of the United States.

OCTOBER TERM 1874.

THE COUNTY OF ST. CLAIR, *Plaintiff in error,*

vs.

JOHN B. LOVINGSTON AND WIGGINS FERRY COMPANY,

Defendants in error.

WRIT OF ERROR TO SUPREME COURT OF ILLINOIS.

STATEMENT OF THE CASE.

Action of Ejectment by *County of St. Clair* originally brought in the Circuit Court of St. Clair County *vs.* defendants in error for the recovery of a tract of land, bounded on the north by the southern line of the First Ferry Division of the City of East St. Louis, as laid out on plat of the First Ferry Division, recorded in the books of record of said County of St. Clair; on the east by the west line of survey No. 579; on the west by low water mark of the Mississippi River, and on the south by the south line of said survey No. 579, extended to low water mark of the Mississippi River. Trial by Jury. Verdict for plaintiff at the October Term 1871. Appeal taken by defendants. Case reversed by the Supreme Court of

Illinois for reasons appearing in the opinion of said Court filed with the record here and remanded to the Circuit Court of St. Clair County. Trial by consent of parties by the Court, and verdict for defendant at the March term thereof, 1874. Appeal by plaintiff to the Supreme Court of Illinois at the June term thereof, 1874, and judgment below confirmed, the Supreme Court refiling the opinion given in the case at its first hearing.

The land sued for was claimed as *accretions* by the Wiggins Ferry Company, and Lovingston was its lessee.

The plaintiff claims the fee simple title to the said lands by an Act of Congress, entitled "*An Act to confirm title to certain lands in Illinois*," of July 15, 1870. U. S. Statutes at large, V. 16, 464, which act is amended by an Act of Congress, approved February 18, 1871, U.S. Statutes of that session, page 27.

Plaintiff also introduced an Act of Congress, entitled "*An Act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their limits*," approved September 28, 1850. U. S. Statutes at large, V. 9, p. 519. Also an Act of the Legislature of Illinois, in relation to Swamp Lands, passed June 22, 1852, by the 1st section of which, it is provided as follows: "*All the swamp and overflowed lands granted to the State of Illinois by the Act of Congress, entitled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved Sept. 28, 1850, are hereby granted to the Counties respectively in which the same may lie, &c., &c.*"

Also Act of March 4, 1854, Session Laws, p. 19, the 13th section of which provides as follows: "*And all the swamp and overflowed lands granted to the State of Illinois by the Act of Congress aforesaid are hereby granted to and vested in the several Counties in which they are situated.*"

Also Special Act of February 12, 1853, Session Laws, p. 223, which provides as follows: "*That all the right, title and interest or claim of the State of Illinois ac-*

quired by virtue of an Act of Congress, entitled: "An Act to enable the State of Arkansas, &c, &c.," in and to the Islands in the Mississippi River within the limits of St. Clair County, are hereby transferred and set over and conveyed to said County."

Also an Act of the Legislature of Illinois, entitled "*An Act for the sale of swamp lands,*" approved February 18, 1859, which allows the Counties to sell the swamp lands.

Also an Act of the Legislature of Illinois, passed March 11, 1869, Sec. Sess. Laws, p. 243, entitled "*An Act to amend an Act for the sale of swamp lands,*" approved February 19, 1859, and which reads as follows:

SECT. 1. Be it enacted &c. &c. That nothing in the first section of the Act, to which this is an amendment, contained, shall authorize the County Court of St. Clair County to sell, grant, convey and dispose of any land or lands lying outside of the lines of the United States survey situate in said County, but the County Court is hereby authorized to lease all or any lands so situate for such time or times as the Court of said County may deem right and proper: Provided that no lease shall be for a longer term than ninety-nine years. Provided further that nothing herein contained shall render void any conveyance heretofore made by said County, but such conveyances are hereby expressly confirmed, and that nothing herein contained shall apply or extend to any land or lands within the limits of the City of East St. Louis in said County."

"SECT. 2. In all judicial proceedings the certificate of the county surveyor of St. Clair County that the lands in controversy are outside of the United States Survey, shall be *prima facie* evidence that the County is entitled to the possession of the same."

The plaintiff also in order to show the character of the survey 579 introduces an Act of Congress, approved March 3d, 1791 entitled "*An Act for granting land to*

the inhabitants and settlers at Vincennes and the Illinois Country. U. S. Statutes at large. Vol. 1, p. 221.

The plaintiff proved by *Edward Rutz*, Assessor and Treasurer of the County, and formerly Deputy Surveyor thereof, that the land in question which he identified as the land sued for, and pointed out on the map in the record, as being in possession of Lovingston, is what is called washed-on land, and now a sandbar, that it has increased within the last four years; never saw it overflowed, as he never saw it when there was high water, and that it is opposite survey 579; that the old Bloody Island was way above, and that all from the west of said survey to the river has been formed, he supposes, by the washings of the river; that Bloody Island was formerly separated by the river from the main shore, but that there is now only about forty acres of it left, and that there is no Island now.

By the County Surveyor *G. Hilgard*, that he made the map in the record as County Surveyor, and that it is correct, that he ran the lines of the surveyed tracts according the United States field notes. That he surveyed the accretions, and what is not yellow colored on the map, was never surveyed by the United States. That Bloody Island was surveyed by the United States in 1824, and according to that survey was about 3-4 of a mile north of the tract in question. That as regards survey 579 on the old bank of the river, there was a line run by the United States, according to the field notes. They correspond with his notes on this map; the Mississippi River is not given as a boundary on the plat The United States notes are as follows:

"Surveyed for Nicholas Jarrot, who claims in right of Jean Dumochelle *100 acres of land*, beginning on the *bank* of the Mississippi River, opposite St. Louis, from which the lower window of the United States store house in St. Louis bears N. 70° West. Thence South 5° W. 100 poles to a point *in the river*, from which a sycamore 20 feet in diameter bears S. 85, E. 250 links, thence S. 85,

E. 130 poles (at 30 poles a slash) to a point. Thence N. 15° W. 170 poles to a forked elm on the bank of Cahokia Creek. Thence north 85°, west 70 poles to the beginning."

That the land in question was made land, and that as late as 1854 it was covered with water. The land was made by the dyke above made by the City of St. Louis, and principally by the dyke of the Pittsburg Railroad Company. Bloody Island was when surveyed about 1-4 mile above Northern Dyke and 3-4 mile north from the tract in question, and that he made the certificate on the map (to-wit that the land had not been surveyed by the United States). That between the Island as they call it that is to say the Original Bloody Island and all the accretions (see Testimony of Rutz) there is some low land, and the present bed of Cahokia Creek runs through it. In time of very low water you may cross from survey 579 to the Lovingston tract on foot. There is always a slough and running water. In high water there is no crossing except on boats. That when the River is at an ordinary stage, it is not passable on foot, and that in high water it will overflow now; that owing to some railroad structures the old river bank cannot now be well defined at all places, but a little further down and below the Round house of the Belleville Railroad the old bank can be defined. That the improvements of the Wiggins Ferry Company protect the lands of the old Island. That what is called the Coudaire Tract or survey 786 includes surveys 579, 624 and 766, and the fractions *on the east* of those surveys to the Cahokia Creek. The Coudaire Tract makes the river the boundary, but at the same time it commences at the corners of the former surveys. It commences on survey 766, the upper Jarrot Tract, and then runs along including *the* fractions (spoken of before by Mr. Hilgard as being east of the Militia Surveys and between them and the Cahokia River) to the south-west, and includes the entire tract below, Survey 579 (the Jarrot Tract) and then *says passing N. Jarrot's Corner*

so many rods, leaving the other parts undisturbed. It says binding the river, but at the same time it makes this corner which the old survey makes in the river. That there was when the three Militia tracts were first surveyed some tracts left between them and the Cahokia Creek. Somebody (Coudaire) went and got another survey (the Coudaire survey) including those three surveys and taking in those fractions and at the same time running below this survey (the lower Jarrot survey 579) and taking in another part, stating in the field notes as so many rods passing this corner (the one *in* the River) so it strikes this corner, and wherever the other corners were made; that the west line of the Coudaire Tract is the River bank or what used to be the River front, when those surveys were first surveyed. The land in question is all west of the Coudaire Tract."

That the line of the Coudaire Tract is the same as the line of 579 (the lower Jarrot or Dumochelle Tract, west of which the County of St. Clair claims), because *those other lines were run first, and the notes of the Coudaire Claim made the same corners.*

By *Jonathan Moore.* That the dyke (upper) was built by the City of St. Louis. In 1852 he surveyed the land south of Bloody Island, on appointment by Governor of the State, returned it as Swamp land. Before that dyke was made there was a good deal of the River on this side. Before the dyke was made the River was coming on this side of the Island, and would have come, as he supposes, but for the labor that was done to prevent it. The current being on this side the land would not have formed at all.

That he never surveyed the Coudaire Tract. Don't know what the words "up the river and binding therewith" mean, would understand if he saw the notes. He would run to the corner of the Nicholas Jarrot survey. That where the line runs from a point from one corner to another, we run from one point to another, but that the Surveyors follow the notes from one point to another;

that he could not say whether the lines were run along the River merely to ascertain the quantity or not; if they get the quantity where the River makes a line, they have to meander the River, and it is done often, but if the line is straight we run from one point to the other.

By *A. G. Moore*, who says that he is a Surveyor, surveyed Bloody Island, or what is termed (officially) Island No. 3. This Island never reached south of the section line between 11 and 14 (see map) of Island No. 3. There was when he surveyed the land for swamp land hardly 20 acres (of Bloody Island). Reached the Island (1852) in a skiff. All below was water to the eastern bank of the River. Those bars that have formed in front of the eastern shore have all been formed since. It was the making of the dyke that made this land. The channel (in 1852) was all on this side of the Island or very near it, the whole of the ice came down there, that where they crossed the River between the Illinois shore and Bloody Island, the channel was 11 chains and 20 links wide.

By *Wm. McClintock*. When he first knew that part of the Country, 1819, the main channel of the Mississippi River was in ordinary stages of the water this side of the Island. In passing I saw the forming of sand bars below the Island. There was water where the present bank is till the dyke was made. Those bars, south of Bloody Island, were made by washing of the bank there (of Bloody Island), after the dyke was made and the River thrown to wash away Duncan's Island on the other side; that that was the cause to give a harbor to St. Louis and the River left this side from the fact that there was an eddy formed in the water, and the rise of the water bringing the sand in that eddy, it sunk there and formed those bars that are there now; that the first accumulations were further out in the River, not adjoining the Island. That he ran on a bar out in the River, and that he believes that was before the dyke was made. Between Bloody Island and bar spoken of there was a passway

for the ferry boat and other boats to St. Louis, and that bar had no connection with the eastern shore of the Mississippi River, or Bloody Island; that was as far back as 1839—1841.

By *John Thomas.* That there was a bar below the Island, and a channel between the two where the boats went, and that another bar formed till the construction of the dyke filled up, and it is all connected together. Those bars were not connected with the main land, nor with Bloody Island. At low water there were separate bars, in high water they were all covered.

The defendant introduced Report of Michel Jones, 2. V. American State Papers Public Lands, P. 615.

Also Act of Congress, April 16, 1814.

Vol. 3 U. S. Statutes at large, P. 125, 126. Act of Congress, April 16, 1814. V. 3 Statutes at large, P. 125, confirming said Report and the Coudaire Claim, also certified plat and field notes of certain surveys made in January, 1815 (which are copied in the record), also Patent to Coudaire (copied in the Record), and which reserves all the title of owners of the Militia Claims, viz: the two Jarrot and the Piggot surveys, numbered *529*, 624 and 766; also Patent to Jarrot, and then connected the Wiggins Ferry Company by conveyances with the Patents, and proved by Col. Jarrot that he knows the land in controversy, and that there is a large accretion formed there; before they were formed the west bank of those surveys had been washed off by the Mississippi. These accretions when they commenced forming he can not say, but there were various changes in the River at different times. That at one time it was a mooted question where the main channel was whether on the east or west side of Bloody Island; but boats continually plied on the west side, and occasionally they passed up and down on the east side, on business, not as a channel. The Island (Bloody Island) had a tendency to wash away at the head of the Island and to form on the foot of it; and that before dyke was built there were frequently large

sand bars at the east and south of the Island. From 1851 the Island kept filling up at the east side, the first thing that protected the Island on the west side from washing away was the stone-break-water, put there by the U. S. Government above the Island and on it, the next was the rivetting of the shore (on the west side of the Island) by the Ferry Company, lining the west side with stone. That the Island forms now a continuous bar down to the Pittsburgh Coal Dyke. There is no water there now separating the bar from the main land, except in part a pond caused by the Cahokia Creek being dammed up.

The first formations he noticed in front of those old surveys were formed south and east of Bloody Island joining it. Not all of this within the green lines before it was filled up was the Mississippi River. As late as 1854 no boats could run here: that perhaps the filling up was localised in a great measure by the dykes, but the filling up was going on, as the River made in next the Illinois bank the Island enlarged correspondingly; that if the dykes had not been built the River would have had all of East St. Louis before this time.

The field notes bind the Coudaire Tract by the River. There was about one hundred acres outside of those three claims; the Coudaire Claim covers the other claims (surveys), and the notes don't regard the division; could not tell whether the western lines as indicated in the field notes of the (lower) Jarrot Tract are precisely the same as the Condaire Tract. One says beginning at the bank of the Mississippi River, and the other begins at the corner; these don't begin at the same place, they correspond, but this begins away from the River and runs the other way. It possibly may be the same, possibly exactly; one begins at one corner and this at another, and witness after pointing out what he supposes to be some discrepancies between the different surveys, says that it seems that this upper claim and the lower one are both called Jarrot's Claims (which in fact they were),

and that that makes the discrepancy there; by taking the length of the three claims it makes that distance right, but that they mention it on the notes as the above mentioned survey 579 would make it the length of these three surveys; that he does not say that the boundaries are the same, but they start the same and come out the same. In those three surveys (Militia Claims) there is nothing said about binding the River, if witness recollects right; and there might be some piece of land left between those claims and the River which the Coudaire Claim could cover. It is very possible there was. It is not likely the River war so straight that they could run each of those three tracts its whole length straight and follow the River, and that the River was not that straight.

THE ERRORS ASSIGNED ARE:

1st. That the Supreme Court of the State of Illinois affirmed the judgment of the Court below.

2d. That the said Supreme Court decided against the grant of the land in question, made by the United States to the said County of St. Clair, by an Act of Congress.

3d. That the said Supreme Court decided, that the defendants, as owners of certain Militia Claims, each claim containing by law one hundred acres, and which claims were actually surveyed and bounded by well ascertained lines, were entitled to the accretions made thereon the Mississippi River, which are some of the lands granted by United States to plaintiff in error.

4th. That the said Supreme Court decided against said grant to the County of St. Clair, in deciding that a certain tract of land heretofore patented by the United States, as an Island and as fractional sections under the United States survey, was entitled to accretions not on the river front and towards the river, but to accretions above and below or on the foot and head of said island,

thereby annulling the grant made by the United States to the said plaintiff in error.

I.

The Law of the United States of July 15, 1870, under which the plaintiff claims, is so plain as not to admit of a misconstruction such as defendants attempt. It exempts the Cahokia Commons, to which the report of Commissioners of the United States Land Office refers, which is cited by defendants.

The Cahokia Commons, by ancient grant, and as shown by the plat (see State Papers Public Lands, V. II. and also report of Commissioners on said Commons), was bounded by the Mississippi River, and so known to be bounded by reputation for the last one hundred and fifty years. Hence lands formed on it may be accretions. For this very reason the Law in question expressly prevents its application to the Cahokia Commons. The point however, whether or not the land sued for is an accretion or not, is for the Courts and Juries to decide. The land in question is unsurveyed land, and in that condition granted absolutely to the County of St. Clair.

II.

The County does not claim an inch of ground within the original survey; only all the new formation west of the western line of 579, surveyed for Nicolas Jarrot, who claims in right of Jean Dumouchelle one hundred acres of land.

III.

The defendant's argument in referring to Bloody Island seems to contend that the land in question might be

claimed as an accretion to said island. It is easy to dispose of this question. The testimony is clear and uncontradicted, that Bloody Island, as surveyed by the United States in 1824, and entered by S. Wiggins, was at its most southerly point, three quarters of a mile above the northerly line of the tract in question. While the owner of an island or peninsula may claim accretions in certain cases, on the face of the river within the lines of his land, it would be absurd to contend that he could claim accretions up and down the river and beyond his lines. Could he do so, he would at once deprive riparian owners above and below, also entitled to accretions, of their rights to claim them in front of their land. If, for instance, claim 579 belonged to another owner entitled to accretions, the latter would lose them, because the accretions on foot of the island would cut him off from the river. Now immediately below this tract 579 begin the Cahokia Commons, but the formation near the island lay right in front of it, and would interfere with the riparian rights of the commoners. As one of the witnesses states, Wiggins Ferry Company might claim down to New Orleans, perhaps, on the same principle. We merely remark, in passing, that the testimony shows that the sand bars in question formed south of the island, were disconnected from it, and only by dint of the improvements made by the City of St. Louis and the Pittsburgh Coal Company filled up, so as to form a connection with Island No. 3, which is the official denomination of Bloody Island. For a better understanding we would also here remark, that all land now west of Cakokia Creek, whether in the original surveys between said creek and the Mississipi River, or new made lands, or what is left of the old island, is now called, not Bloody Island, but "the Island," and known by that appellation alone, and where *some* of the witnesses speak of the Island, they speak of all these tracts together.

IV.

We now come to the tract in question, the Dumouchelle Tract, survey 579, to which the land claimed by plaintiffs is said by defendant to be an accretion, and which is by the defendant called a part of the Coudaire Tract. By reference to the maps in the record it will be seen that there were three one hundred acre tracts on the bank of the Mississippi River, viz: Survey 579, Nicolas Jarrot, in right of John Dumouchelle; survey 624, heirs of Piggot, in right of Samuel Ware, and survey 700, Nicolas Jarrot, in right of Jos. Cuillard.

The Commissioners in the Kaskaskia Land District under authority conferred by Act of Congress on March, 26, 1804, entitled "*An Act making provisions for the disposal of Public Lands in Indiana Territory*, &c., reported their decisions to the Secretary of the Treasury, December 31st, 1809, and in their report were embraced the three surveys above mentioned, which they reported as to be confirmed, the same being entered by them in their report of claims within the district of Kaskaskia, founded on the Act of Congress granting a donation of one hundred acres of land to each militia man enrolled and doing duty in Illinois on the first day of August, 1790. In their report the Commissioners described the said tracts of land of one hundred acres each, as surveyed by virtue of an order from the government, "on the banks of the Mississippi" and the Cahokia Creek—see V. II American State Papers, Public Lands, pages 167, 168, 172,—which said decision of the said Commissioners was duly confirmed by Act of Congress, May 1st, 1810, and also Act of April 27, 1812.

The three patents issued for said surveys gave no description of the land, but describe them as militia claims, giving numbers of claims and survey, situated in township 2 north, range 10 west of the 3d principal meridian. At a later period one Pierre Coudaire presented a claim for four hundred acres, as an improvement claim,

ing the heads of families four hundred acres within the same limits as in the resolve, re-enacting said resolve of June 20th, 1788, and also providing in the 6th section that the Governor of said Territory be authorized to make a grant of land, *not exceeding one hundred acres*, to each person who hath not obtained any donation, &c., and who has done militia duty, the said land to be laid out at the expense of the grantees, in such form and place as the said Governor shall direct.

Section 8 provides that the Governor of the Northwest Territory is directed to lay out the said lands agreeably to the Act of Congress of June 20th, 1788, (which provides that the said lands shall be located within certain parallelograms).

VI.

WHAT ARE ACCRETIONS.

The doctrine of accretions is found fully developed in the Roman law.

The acquisition of a thing, because it becomes connected with another thing already belonging to a person, was called by the civilians "*accessio*," of which "*alluvio*" (accretion) was only a species.

Alluvion is an accretion of a tract of land, bounded by a river, *the owner of which is not limited by a certain measure.* It does not apply to what the Romans call "*ager limitatus.*"

§ 20. *Inst. de rerum divisione et qualitate.*

Lex 7, Dig. § 3. Also Lex 12 ibid.

Lex 16. *De acquirendo rerum dominio*, 41, 1.

Lex 24. Dig. § 3. *De aqua et aquae pluv. etc.*, 39, 3.

Lex 1. § 1. Dig. *De flumin.* 43, 12.

Alluvion must be gradual and imperceptible by natural causes.

§ 20. Inst. *De rerum divisione*, 2, 1.

Lex 7. § 1. Dig. *De acquirendo rerum dominio*, 41, 1.

If an island is formed between an island and the shore, it is to be divided between the owner of the island and the owner of the above tract, which is also the case if the river should leave its bed between the shore and island, and in the measurement of division the rectangulum is to commence from the utmost boundary of the island, which is nearest the opposite shore.

Lex 56. § 1 Dig. 41, 1. *De acq. rerum dominio.*

Lex 65. § 3. Ibid.

The common law of Germany is essentially the same.

See Mittermayer, Principles of the common private law of Germany, Vol. 1 § 147.

The words are: "The Roman law as to the formation of islands, alluvions, &c., is applied as the common law of Germany, though there are some deviations from it by laws of particular States, which often determine islands to belong to the Sovereign."

The Code Napoleon defines alluvion as an accretion, which forms by and by and imperceptibly on land bounded by a river.

Code Civil, Titre II. § 556.

The Common Law as to not navigable rivers has adopted the civil law, and according to it an accretion is an addition of soil by gradual deposition, through the operation of natural causes, to the real estate already in possession of the owner.

2 Washb. on Real Property, § 551.

1 Bouvier's Law Dict., Alluvion, page 94.

3 Kent, 428.

Angel on Water-courses, § 53.

VII.

From the foregoing we deduct two points:

1st. The accretion must be produced by natural means, and not by artificial ones, particularly if such artificial ones are made by others than the riparian owner.

2d. It must be clear and apparent by the grant that the land to which an accretion is claimed was actually bounded by the river. Angel on Water-courses, as to river-boundaries, §§ 11, 15, 16, 18, 20, 23.

Now as to the first point, the evidence clearly shows that as late as 1864 (see testimony of Hilgard, Jonathan and A. G. Moore), where this land now is, there was water. Some bars had formed out in the river south of Island No. 3, but there was a channel on this side of the island, though not the main channel. Those bars near the island, and some accretions to the island, were formed by improvements made north of the island, by the United States government throwing the river towards the City of St. Louis. The land in question was made by the dyke constructed by the City of St Louis, about a mile above, connecting Bloody Island or Island No. 3 with the main shore on the Illinois side, and more particularly by the improvements being made and enlarged from 1852 on. The upper dyke stopped up the channel, the lower prevented the back water from forming a large arm of the river or a lake up to the upper dam. Those sand bars forming in the river, of which McClintock and Jarrot speak, would have met the island in course of time and prolonged it toward the south, but a part of the Mississippi would still have run between the island and main bank, but for the dykes. The binding of the shore by the Wiggins Ferry Company had only the effect of keeping the land made by those two dykes. See testimony of Hilgard, the County Surveyor.

As to the second point, upon all the authorities, we insist, that accretions do not enure to the owner of the bank, whose boundaries are well defined in the grant; in other words, not to an "*ager limitatus.*" We presume there is no exception to this rule existing, as we have seen, in the Civil, the German, the French, and the Common Law of England.

The Supreme Court of Illinois has in no instance, far as it has gone to extend the rights of riparian owners,

obliterated this landmark. It has taken care to refer to it in all the various decisions on the subject.

In the leading case, Middleton *vs.* Pritchard and others, 3 Scam. 510, the Court say: "Where islands are marked, mapped, platted or surveyed, or where islands are distinctly drawn on the plat as bounding the front of rivers, lakes or other waters, these distinct acts of the grantor must explain, control or determine the interpretation, construction and extent of the grant."

On page 522 in the same case the Court say: "There is no line upon the maps or plats, nor any deviation in the field notes, nor any visible monument to define and designate the southern boundary of the tract. It is sold, more or less. If there be more, the purchaser gets it; if there be less, he loses it. This (quantity) therefore cannot control."

See, also, Lafflin *vs.* City of Chicago, 49 Ill. 175 and 176. The Court say: "The title of the riparian owner extends to the middle thread of the stream, if it is called for as a boundary. In this case the United States government granted these lots, bounded by the Chicago River, and made no reservation. The plat in that case showed that the lots were bounded by the Chicago River, and the Secretary of War, in explanation of the plat said:

" "The middle of the rear of the water lots bounded on the Chicago River is determined by posts set at the intersection of the lines of the lots and streets with meanders of the river, as shown by the notes entered upon the meandered lines." "

We do not at all, in our theory of the case, come in conflict with the decisions heretofore made by the Supreme Court of Illinois. We argue it now upon the doctrine of that Court that, as to riparian owners, the Mississippi it not a navigable river.

VIII.

We have heretofore referred to the history of those claims; now let us make the application.

The region of country from the mouth of Wood River, a little below Alton, to the mouth of Kaskaskia River, between the bluffs on the east and the Mississippi River on the west, is generally known as the American Bottom. It is about ninety miles long, and averages five miles in width.

At the time of the resolve of Congress, June 20, 1788, no American resided there. The principal settlements were at the Kaskaskies, Prairie des Rochers and Cahokia, the latter opposite Carondelet, and a little below St. Louis, though there were others, such as Fort Chartres, Prairie du Pont and Cantine, the latter extending nearest to Wood River. It was known that the French settlers had occupied that region under various ancient grants, and Congress, as early as 1788, also provided that such settlers, in addition to their prior possessions (provided they had declared themselves citizens of the United States), should have each family a four hundred acre-tract. It was provided by Congress, in order to fill the ancient claims, and also to reserve lands for those settlement or head rights, that a sufficiency of land should be surveyed between the Mississippi River and the highlands in parallelograms, by the Geographer of the United States.

The law of 1791, above cited, re-enactsd in the main this resolve, and made in addition a grant *not exceeding one hundred acres* to such settlers as might have performed militia duties, providing again for a reservation of lands for all those purposes, to be laid out as provided in said resolve. Now, we hold that these donations (which being without consideration are not to be strictly construed against the grantor) were limited to exactly the quantity fixed by the law. It would have been most unjust to give one militia man one hundred acres, and to another, by possible accretion, one thousand acres.

It is to be presumed that the surveyors, under the direction of the Governor of the Northwest Territory, carried out the directions of the law; that is, that they laid out said reservations in parallelograms. This being done, there was no possibility of making the river the boundary, except where, as in this case, as the maps show, accidentally the river bank was quite straight and fell on the western line of the parallelogram, though it was not so straight but what one of the points of the survey was fixed in the river.

Now look at the field notes of survey 579, the tract in question, given in evidence with Hilgard's map, and it will be at once apparent that the case of Middleton *vs.* Pritchard et al. does not apply. There is not a word said in said field notes about binding the river or meandering with the river; the lines are clearly and distinctly given. Jarrot says the field notes of the three militia claims do not say binding with the river. The field notes of the Coudaire Tract are equally definite, the southerly line terminating at a post on the bank of the Mississippi River, thence up the Mississippi River and binding therewith (passing the southwesterly quarter of Nicolas Jarrot's survey, No. 579), to a post ——— northwesterly corner of Nicolas Jarrot's survey, No. ———, claim 100 (which it will be seen by the map is survey 766, claim 100,) the uppermost of the three militia tracts.

The survey was from a post on the bank by the southwest corner of survey 579, a certain distance and by a certain angle, to the southwest corner of the survey 766. (Jarrot had confirmed to him both those surveys.)

Hilgard positively swears that the west line of the Coudaire survey is identical with the west line of the three militia claims.

We hold that both those land donations, militia claims and settlement rights (Coudaire's being of the last description, but covering the three militia claims), were each "*ajer limitatus*," a well defined, measured tract of

land. The patent to 579 (tract in question) contains no indication that the Mississippi is the boundary.

Coudaire took nothing of these militia claims, but as explained in the testimony, only the fractions east, between the lines of the militia claims and the meanders of the Cahokia Creek. The title of defendants to the land in question ultimately rests solely on the militia claims, the Coudaire grant being, as expressed in the patent, utterly void as to them.

The militia claims, 579, 624, 766, were confirmed before the Coudaire claim was confirmed, and of course could not, by the express terms of all those confirmatory laws, interfere with the said militia claims. The Coudaire tract was confirmed as a settlement right, which was by law not to exceed 400 acres.

IX.

The defendant has cited the law of Congress of February 27th, 1815, amendatory of the law of August 16th, 1814, entitled "*An Act confirming certain claims to land in the Illinois Territory, and providing for their location.*"

By examining the acts of 1814 and 1815, referred to by defendant, it will be seen that neither has any application at all to this case.

In 1814 it had been found out that the lands reserved for the purpose of satisfying the claims of the French settlers and militia men in the American Bottom, by the act of 1791 and the resolve of 1788, were not sufficient, and so it was provided by the 3d section of the act of 1814 that another tract, beginning at the township line nearest to and above the mouth of Bigg Muddy River; thence east to the meridian line; thence north with said meridian line to the north boundary line of township No. 5 north; thence west to the Mississippi River; thence down the same to the beginning, shall be reserved and set apart to satisfy the unlocated claims of persons to

land within the Illinois Territory, confirmed to them heretofore by this act.

The same act gives to settlers within said tract, however, a right of pre-emption.

This tract is at least one hundred miles from the French settlements spoken of in the resolve of 1788 and the law of 1791.

The act of 1815 refers, by express terms, to this tract alone, and provides that locations may be made on said tract to the middle of the river and islands.

So far from this act showing anything in favor of the position of the appellant, it is destructive of the idea that a location in the tract described in the law of 1814, made on the Mississippi River, would carry with it by riparian rights any bars or island from the shore to the middle of the river. It considers those bars and islands as fit to be appropriated by independent claimants, not the owners of the banks, and the government thereby expressly declared itself to be owner from the bank to the middle of the river.

X.

The Condaire field notes do not make the river the boundary as little as the patent. The western line is given by courses and distances and monuments, to-wit: the two corners of the militia claims, as established by the field notes thereof, and the words "binding the river," merely show that the said lines at this place run alongside of the river. See Jonathan Moore's testimony as to the words "binding the river."

There was no advantage of the river front when those locations were made. The country was hardly settled. St. Louis was a little village. The important point was Carondolet, on the Missouri side, six miles below. Canoes, and now and then a keel-boat, were the only craft on the river. No wharfage, no wood-yards were thought of.

XI.

We then resume:

1. The lands in question are not accretions, having been formed by artificial structures, not even made by appellants.

2. The land in question is outside of the boundary line of survey 579, and also of the Coudaire claim, both tracts being bounded by specific lines and not by the river, being "*ager limitatus*" by a definite quantity and exact measurement.

XII.

Upon the hypothesis of claiming through the State:

The Act of Congress to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, grants all unsold swamp and overflowed lands unconditionally to the States. It makes no difference whether they were surveyed or not. The surveying is only part of the machinery by which the States were to have the donations defined. The State became the absolute owner of the lands, with power to dispose of them in such manner and for such purposes as to the Legislature might seem the most expedient. Board of Supervisors of Whitesides County *vs.* Burchell et al., 31 Ill. 68. They being swamp lands, the title vested in the State by the Act of Congress.

Government may pass title to its property by enactment as effectually as by a patent. 34 Ill. 395, Dart et al. *vs.* Hercules.

The character of the land may be shown on the trial of a cause, by competent testimony.

These lands were conveyed to the respective parties by act of June 22d, 1852. Gross' Statutes, 1868, p. 724; also by act of March 4th, 1854. Ibid p. 731.

By a special law, February 12th, 1853, Session laws, "*All the right, title, interest or claim of the State of Illinois, acquired by virtue of an Act of Congress, en-*

titled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28th, 1850, in and to the islands in the Mississippi River within the limits of St. Clair County, are hereby transferred, set over and conveyed to said County."

By Act of January 29th, 1859, Gross Statutes, p. 732. Counties are allowed to sell all or any swamp lands, &c. See Act of Legislature, March 11, 1869. Session Laws, 1869, p. 243.

That last act does not refer exclusively to the lands embraced in the act of 1859, allowing counties to sell swamp lands, &c. It refers to lands outside of the United States surveys, and forbids the sale of them hereafter, but allows to lease them.

Now, if those unsurveyed lands belong to the State by any title whatever, the County is to lease them, but not to sell them, thereby vesting a limited title in the County as to those lands, whether swamp lands or not, and entitle it to recover posssession.

This law further provides that in all judicial proceedings the certificate of the County Surveyor (which was given in evidence), that the lands in controversy are outside of the United States Survey, shall be *prima facie* evidence that the County is entitled to the possession of the same, thus giving a possessory right to all lands outside of the United States survey to the County.

XIII.

We have thus far argued the Case strictly within the decisions of the Supreme Court of Illinois, which are to the effect that all grants bounded upon a river *not navigable* (to which class they decide the Mississippi River to belong), as to riparian rights, entitle the grantee to claim to the centre thread of the river and all the islands lying between the main land and the centre thread of the current.

Middleton *vs.* Pritchard, III. Scam. p. 510.

The doctrine that no rivers are navigable, except wherein ebb and tide flows, said to be the common law doctrine, but denied even in England, is repudiated by many decisions in the State Courts.

2 Binney, 475, Carson *vs.* Blaser.

14 Serg & Raw, 71, Commonwealth *vs.* Fisher.

1 Penn, 462, 467, Schmuker *vs.* Schuylkill N. Co.

2 Devereux, 30, Wilson *vs.* Forbes.

1 M. Cord, 580, Cates *vs.* Wadlington.

6 Humphreys, 358, Elder *vs.* Burrus.

2 Porter, 436, Bullock *vs.* Wilson.

38 N. Y., 461, People *vs.* Canal Appraisers.

3 Clark (Iowa), p. 1, McManus *vs.* Carmichael.

In this Court decisions have been made which strongly favor the view that the navigability of the river does depend on *navigation in fact*, and not on the supposed English definition.

See also, Woolrych on Waters, p. 14.

And a very able article on Navigable Rivers in Vol. II, No. 4, p. 589, July number, 1868, American Law Review, to which the attention of the Court is specially invited.

If then the Mississippi is a navigable river, as to riparian rights, the accretions belong to the sovereign, and Congress had an undoubted right to grant them to the County of St. Clair.

XIV.

The decision of the Supreme Court of Illinois in the present case of which we complain, starts with the very positive, but somewhat surprising declaration that "if the land of the riparian proprietor was bounded by the Mississippi, his right to the possession and enjoyment of the alluvion is not affected, *whether the stream was navigable or not.*"

We do not wish to spend any time in criticising this legal dogma. Neither do we think that the maxim "*de minimis non curat lex*," to which the Court refers is happily applied, when the accretions, for a part of which this suit is brought, comprise some 300 acres in the whole, worth at least a million of dollars. Neither can we appreciate the distinction between the accretions and the bed of the river, for the river bed was up to 1852 where the accretions now are. The river being turned westward by the dyke made at the north, and back-water prevented by the dyke south, the old bed of the river became apparent again. The accretions settled precisely on the old bed of the river, and the accretions, as they are called, sued for, are really the bed of the river as it was when the militia claims and the Coudaire claim were first surveyed.

If we are correct in this, the whole reasoning of the Court falls to the ground; for the Court admit that the river bed could not be claimed by defendant. If the bank of the river had always remained the same, then land formed on the front of it might be such accretions, of which the law takes no notice.

We also do not share in the belief of the Court that the claimants who made their claims in 1804 and who were simple french hunters and fishermen, who cultivated off and on small patches of maize, gumbo and red pepper on the Mississippi, then "realised the vast importance of the Mississippi River to them and to all the people bordering upon it in the grand future *soon* to be unfolded." They did not and could not then anticipate the appliance of the power of steam to boats or to the locomotive, without which this region of country to day would be very little less of a wilderness than it was then. Notwithstanding that the Court say, that "it needed no prophetic eye to foresee prior to the year 1850 these grand improvements which bring the products of an Empire to the father of waters" we are decidedly of opinion that if Jean Dumochelle had foretold all that in

1804, he would have been most justly entitled to the appellation of a prophet.

We are likewise constrained to dissent from the position taken by the Supreme Court of Illinois, that the riparian owner was entitled to the accretions, "forced upon him by *the labor of others*, without his consent or connivance, and thus cutting him off from the benefits of his original proprietorship, and that neither the State nor any other individual can divert the water from him by artificial structures which cause deposits between the old and new bank, so as to divest him of the use of water."

For in the first place the testimony shows (see V. Jarrot's testimony) that had the structures not been made, not only what was left in 1852 of the three surveys in question would have been swept away, but *all* of the City of East St. Louis, which extends some mile or more farther east. By those structures not only a portion of the original surveys was saved, but all of the ground originally included was reclaimed, and is the undisputed property of the defendants, as the County only claims west of the original lines, that is to say the old bed of the river, and in the second place, while the riparian owner might have prevented the State or other individuals from turning the river from their banks, which some other shortsighted riparian owners actually attempted to do by enjoining the City of St. Louis from building the dyke.

V. Gillman, Ill. Rep. p. 351, People *vs.* City of St. Louis, it does by no means follow, as it strikes us, that by acquiescing in such turning off the stream, the riparian owner gained any rights whatever in addition to those which the law of the land gave him. If he was bounded by a *navigable* river, the accretions belonged to the Sovereign, and if his land was bounded by distinct lines and limited to a certain quantity of acres, he was not entitled to them, even if the river was *not navigable*.

But we respectfully, but most emphatically, dissent from the main position of the Supreme Court, as to the boundary of the land, the ownership of which is said to entitle defendant to the new made land or rather the old bed in dispute. This suit is brought for the new made land, or old bed, opposite survey 579, which survey was owned by N. Jarrot in right of Dumouchelle. That survey as well as the other two militia surveys 624 and 766, north of 579, were reported upon favorably by the Commissioners in 1809, and confirmed by the often mentioned laws of Congress of May 1, 1810, and February 20, 1812.

The *Coudaire* claim and survey (No. 786) was reported upon in 1813 and confirmed by a law of Congress of 1816. It comprises the three militia claims, and as to them as a matter of course is *utterly void*, even if the Coudaire patent did not expressly "*except and reserve the said surveys*, naming them, *from the transfer by these presents.*"

All that the Coudaire survey and patent could claim would be the fractions originally left between the eastern line of the three militia surveys and Cahokia Creek and a small piece south of the south line of survey 579 (Dumouchelle), which is not in dispute, though even that piece is covered by survey 579, the Cahokia common tract, confirmed to the inhabitants of the village of Cahokia by the laws of 1810 and 1812. The western line of the Coudaire survey *is absolutely the same* as the western line of survey 579 (Dumouchelle), as sworn to by the surveyors and even admitted by defendant's witness Jarrot, and as is manifest from the field notes, which are the same as to both surveys, thus doing away with the idea of there being possibly some land between the Dumouchelle line and the Coudaire line. Besides the Government, according to the views of the Supreme Court, would never be guilty of the injustice to sell land in front of other land before sold and which had a river front. *The Coudaire survey and patent are therefore entirely outside of the present case*, and ought to have been excluded by the Court from consideration, although

the Supreme Court makes one expression in the field notes in the Coudaire tract almost the *pivot*, on which their decision turns.

Now neither the survey, nor the field notes, nor the patent of the Dumouchelle tract (survey *579*) *make the Mississippi River the boundary*, but the line is run straight, from a point *on* the bank to a point in the river and nothing said in the field notes or shown in the plat, that it was bound by the river, or the land meandered the river. The Coudaire survey, we repeat, was lagged in to this trial improperly and with a view to confuse.

Now then, the Coudaire survey being left out of consideration, the Dumouchelle tract from which alone the defendants may claim, is clearly a *limited tract* and not entitled to accretions. That point was conceded by the defendants below, and in the Supreme Court of Illinois, and hence their great effort to bring in the Coudaire survey, *because the field notes of that survey say, thence north 5° E. up the Mississippi River and binding therewith.*

Now suppose, for argument's sake, that it was the Coudaire survey by which the rights of the defendants were to be measured, would they be in any better position? We think not, for neither the survey nor the patent show that the westerly line of the Coudaire survey was bounded by the river.

It runs from a certain point north in an angle of 5° E. and cannot bind the river, unless the river run quite straight, which in fact it did and which the Supreme Court admits, then the expression *binding the river* means no more or less than the statement of an *accidental fact*, to-wit that that line was running exactly along the course of the Mississippi River. It is not possible to *make a straight line between two points*, and at the same time make the line correspond with another line, which is not equally straight, which a river line occasionaly only, as in this case, would be. So this binding the river merely establishes a fact as existing, but does not give

the true boundary line itself any other direction or deviation, than what would be a straight line between two distinct points, the direction of the line being defined by two distinct points. Suppose field notes should say that a certain line commenced at a certain stone corner, marked A., and run to another stone corner, marked B., but should give the angle of the direction of the line wrong, would not the two stone corners control? We insist that they would.

We are not left however to our own construction of what must be understood by the term *binding the river.* This language has been considered by Courts before this.

In Hardin 59, Sanders vs. McCracken, it is held that a deed calling to run to a creek and down the creek with the meanders, *binding therewith* (the exact language in the field notes of the Coudaire claim) *conveys no right to the channel or the bed of the creek.*

See to the same effect 3 Bibb. 205, Yoder *vs.* Scoop.

Besides all that, we contend that the intention of the grantor must also be gathered from the *quantity* alloted; and the circumstances surrounding the grant. We have already alluded to the law of Congress of 1791, by which each militia man was to have 100 acres and no more as applicable to the Dumouchelle claim. Now Coudaire's claim was a so called head right or settlement donation, the character of which claims is described in

II. V. A. St. Papers, Public Lands, p. 144,

granted under the resolve of Congress of 1788,

U. S. Statutes, Storey's Ed., Vol. I, p. 582,

which provides "for the laying off to the French and Canadian inhabitants and for their benefit three additional tracts adjoining the several villages of Kaskaskias, Prairie du Rocher, Cahokia (Coudaire's tract belongs to the Cahokia lands) and in the form of a parallelogram, extending *from* the Mississippi eastward to the ridge of rocks before described, and to such *extent as shall contain four hundred acres* for each of the families now living, &c., &c.

This donation is confirmed by act of Congress of March 3d, 1791, before cited; and in the fourth section the term is used not *exceeding* to any one person four hundred acres.

In Orendorf *vs.* Steele, 2 Barb. S C. A. 128, where there was a question as to whether a grant to a line to the river and thence down along said river, would carry that line (no other corners being given on the river) to the middle of the river, the Court said: "*It appears on the face of the patent that the Colonial Governor, in issuing this patent, pursuant to his instructions, acted under the direction of the Council, which allowed only 100 acres to be patented to each German emigrant, to be alloted and granted severally. — We are to look to the whole patent to enable us to give a just interpretation to any part of it; and we cannot but see, that it was the leading object and intent of the parties to convey to each patentee 100 acres and no more.*"

In cases of doubt the construction of a grant is according to the English Common Law in favor of the Government and against grantee, and this doctrine applies in the United States most assuredly to all gratuitous grants, or donations. The language of the law of 1791 is that 400 acres should be *given*; the language of the resolve is that they should be laid off for the benefit of such inhabitants.

The Supreme Court of Illinois hold "that a grant from the Government is most strongly construed against the grantee, and whenever there is a doubt, it enures to the benefit of the Government."

Mills et al. *vs.* St. Clair County, 2 Gilm. 227.

It was equally improper to introduce the patent to Bloody Island, which never reached within 3–4 of a mile of the Dumouchelle Survey, and within the extented or projected lines of which the County claims the old bed of the river. We have already argued that the owner of Bloody Island could under no circumstances claim accretions south or north of their sectional lines, but only

on the sides facing the river, nor could any improvements made by them to protect the river front of their island, have any bearing on turning the river westward, this could only be done by break-water-dams above their island, which were made by the United States, and by the dyke connecting their island with the eastern shore of the river which was made by the City of St. Louis.

We conclude by again stating most emphatically that, independent of the question whether the Mississippi is a navigable river or not, the rights of defendants are solely to be measured by the condition and character of the Dumouchelle tract and its proper boundaries, and, if we are correct in that, we are satisfied that the case must be decided for the County of St. Clair.

GUSTAVUS KOERNER,

Counsel for plaintiff in error.

Supreme Court of the United States.

October Term, A D 1874.

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND
THE WIGGINS FERRY COMPANY.

From Illinois Supreme Court.

Defendants' Argument.

WM. H. UNDERWOOD,
Attorney for Defendants.

Supreme Court of United States.

October Term, A. D. 1874.

THE COUNTY OF ST. CLAIR
vs.
JOHN B. LOVINGSTON AND
THE WIGGINS FERRY COMPANY.

From Illinois Supreme Court.

Defendants' Argument.

This was an action of ejectment commenced by the County of St. Clair in the State of Illinois for the recovery of certain accretions or alluvial to survey No. 579, opposite the City of St. Louis in the State of Missouri, and lying between said survey and the Mississippi river. Plea the general issue. Trial in the St. Clair Circuit Court at May term, A. D. 1874. Court found defendants not guilty and gave judgment against plaintiff for costs. Motion for a new trial overruled by the Circuit Court; exceptions to said ruling, and case taken to the Supreme Court of Illinois. The Supreme Court of Illinois affirmed said judgment at its June term, A. D. 1874, and decided that said County had no interest in said lands and the title thereto was in said Wiggins Ferry Company for the reasons given in the opinion of said Court attached to the record in this case.

The Bill of Exceptions contains all the evidence and plats necessary to a clear understanding of the case.

The land in question was all made land by the works constructed by the United States Government, above Bloody Island, known as Island No. 3, or by the dyke from Bloody Island to the Illinois shore, or by a railroad extending its track into the river south of the accretions in question; or by the works of the said Wiggins Ferry Company constructed on the west side of said island, or by all these combined with the action of the river.

Col. Jarrot testified that the tendency of the river was to wash away the head of Bloody Island and form at its foot, and that the breakwater put by the U. S. Government above the head of Bloody Island on the eastern shore had a tendency to turn the channel and make the accretion.

McClintock testified that the rock put by the Wiggins Ferry Company on the west side of the island had the same tendency.

Jonathan Moore testified that he could not say that the works of the railroad below and the dyke above, made this land, "Should think it was making without them. It has formed a good deal faster since the dyke was made,"—as appears in the record.

The plats of survey 579, indicate that its west side was on the Mississippi river. Its field-notes are as follows: "Surveyed for Nicholas Jarrot, who claims in right of Jean Dunvehele, 100 acres of land. Beginning on the bank of the Mississippi river opposite St. Louis, from which the lower window of the United States Storehouse in St. Louis bears N. 70 3-4 W.; thence S 5 West 160 poles to *a point in the river* from which a sycamore 20 inches in diameter bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia creek; thence N. 85 W. 70 poles to the beginning."

The County claims title, 1st, under an act of Congress as follows:

"CHAP. CCCI.—An Act to confirm Title to certain Lands in Illinois.

July 15, 1870. Title of the U. S. to certain lots &c., in St. Clair County Illinois confirmed to said County.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the title of the United States to all lots, out-lots, tracts, pieces, parcels, and strips of land, in St. Clair County, State of Illinois, lying and situate outside of the United States surveys, as noted in the field-notes of the United States Surveyors, and on the Mississippi river near surveys seven hundred and sixty-six, six hundred and twenty-four, and five-hundred and seventy-nine, and near and adjacent to fractional sections one, two, eleven and twelve town[ship] one north, range ten west third principal meridian, be and the same is hereby, confirmed and granted to said St. Clair County in said State; *provided*, that nothing herein shall apply to the ancient French Commons in said County." Approved July 15, 1870. 16 United States Statutes at Large, pp. 364, 365.

Was it the intention of Congress to donate to the County of St. Clair lands worth many millions of dollars, *not surveyed or noted* on government plats, including in this case several thousand acres, in the year 1870—at a time when all the property of the Government was needed to pay her war debts, to be counted in billions, and while no lands were donated to the soldiers or their widows and orphans? And would such a donation be made at that time to one of the most wealthy and populous Counties in the State of Illinois?

That act purports to donate to said county the title of the United States, if any, to all *lots*, *out-lots*, *tracts*, *pieces*, *parcels and strips* of land outside of the United States surveys *as noted in the field-notes of the United States Surveyors*, and on the Mississippi river near, not joining as they do, surveys 766, 624 and 579, and near and adjacent to fractional sections 1, 2, 11 and 12, town one (*quaere*, *two*) north, R. 10 west of 3d P. M.

See 16 U. S. Statutes at Large, p. 416, Act as amended February 18, 1871.

This law and the Swamp law should be expounded as having reference only to public lands recognized in the United States Land-Offices or by the United States authorities, and not to accretions on the Mississippi, which the report of the United States Land-Office of 1868 on pages 121, &c., treated as belonging to owners of land bounded on the river. And such has been the settled doctrine of the United States and its authorities ever since A. D. 1836, when the case of New Orleans vs. The United States was decided in 10 Peters' U. S. R. p. 717.

2nd. The County claims title also under the Swamp Land Act entitled "An Act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits." Approved February 28th, 1850, and found in 9 U. S. Statutes at Large, pp. 519, 520. This act manifestly was only intended to cover unsold "swamp and overflowed lands," made unfit thereby for cultivation, at the passage of this act, and to which the Land-Offices afforded evidence of existence; inasmuch as section 2 provides, "It shall be the duty of the Secretary of the Interior to make out an accurate list and plats described as aforesaid and transmit the same," to the Governors of the respective States where they existed; and that he, at the request of such Governors, cause patents to be issued to the States therefor. See secs. 2 and 4 of said act.

The Legislature of Illinois evidently so understood that law. By secs. 8 and 9 of the act of 1854, p. 21, the evidence of title furnished by the Secretary of the Interior was required to be filed in the Auditor's Office; and the Auditor of Public Accounts was required to furnish each of the several Counties a "correct abstract or list of said lands, certified by him under seal of his office." "And the lists so made out shall be sufficient evidence of the title therein described." Said lists to be forwarded to Clerks of County Courts and filed in their offices, and there

recorded. The Auditor was required "to cause the lists or patents received from the General Government to be recorded in a well-bound book, and preserved in his office;" and "certified abstracts, or diagrams therefrom, shall be evidence of the facts therein stated."

So, by section 3, of the act of 1852, p. 179, the Auditor was required within a reasonable time after the passage of said act, "to furnish to each of said Counties a full abstract of all the swamp and overflowed lands within the limits of the same," etc., to be recorded in a book in the County Clerk's office, etc.

Section 5 of that act makes it the duty of County Surveyors who have surveyed "said swamp and overflowed lands in their respective Counties to make out plats of the same," the quantity, quality thereof, etc.; and their plats shall be recorded, etc. Sec. 13 requires the Surveyors, etc., shall also report what part of said lands are susceptible of drainage, and the probable cost thereof.

If this be the true construction of the act of Congress in relation to swamp and overflowed lands then the supposed title of the County to this land, as such lands, fails. And the certificate of the County Surveyor, Hilgard, made as he states, is a nullity. All the surveyors admit that the land in controversy was never surveyed or platted by a United States Surveyor; and the said County Surveyor testifies that all the land in question was under water as late as 1854. The Moores, who surveyed the land for the State and County in 1852, never surveyed or platted this land as swamp land. Their testimony and plat show that they only surveyed lands then above water around Bloody Island, outside of United States surveys. Their plat appears in Albert Moore's testimony.

It will not be contended, we presume, with any hope of success, that the Swamp Land Act of Congress was designed or did transfer to the States, accretions or alluvion at the date of the Act of Congress or since, belonging to the riparian proprietors on the Mississippi river, for reasons to be presented hereinafter.

The plaintiff in an action of ejectment must recover on the strength of his own title and right of possession. City of Cincinnati vs White, 6 Peters' U. S. R 431; Penn vs. Holme, 21 Howard U. S. R. 481; Stewart vs. Dutton, 39 Ill. R. 91, and cases therein cited.

TITLE OF WIGGINS FERRY COMPANY AND OF LOVINGSTON, ITS LESSEE.

This title is founded on an act of Congress entitled "An Act for granting lands to the inhabitants and settlers at Vincennes and the Illinois country, in the territory northwest of the Ohio, and for confirming them in their possession," passed March 3, 1791. The fourth section of which is as follows:

Sec. 4. *And be it further enacted*, that where lands have been actually improved and cultivated at Vincennes, or in the Illinois country, under a supposed grant of the same by any commandant or court claiming authority to make such grant, the Governor of said territory be, and he hereby is empowered to confirm to the persons who made such improvements, their heirs or assigns, the lands supposed to have been granted as aforesaid. or such parts thereof as he, in his discretion, may judge reasonable, not exceeding to any one person, four hundred acres." 1 U. S. Statutes at Large, p. 221.

By an act of March 28, 1804 (2 U. S. Stat. at Large, p. 277, sec. 4), the Register and Receiver of the Kaskaskia land district were authorized, as Commissioners, to hear in a summary way all matters respecting land claims in their district, to administer oaths and examine witnesses and such other testimony as might be adduced, and decide thereon according to equity and justice; and their decision should be laid before Congress, subject to its action thereon, &c.

By an act of Congress of March 3, 1805 (2 U. S. Stat. at Large, p. 344, sec. 5), the powers of said Commissioners were continued, and they were required to report to the Secretary of

the Treasury and Surveyor-General two transcripts of their decisions *in favor of* claimants, and also to the Secretary of the Treasury a transcript of the claims they had *rejected*, &c.—together with the evidence adduced in support thereof, and such remarks thereon as they might think proper — such reports to be laid before Congress.

By an act of February 20, 1812 (2 U. S. Stat. at Large, p. 677, sec. 1) the powers of said Commissioners were continued.

Also, a report made by Mich. Jones, Register, &c., dated January 18, 1813, under the head of "Statement of Claims founded on actual cultivation and improvement and the act of Congress of the 3rd of March, 1791."

* * * * * * *

No. of Claim 2667, Pierre Condaire original claimant, heirs of P. Condaire present claimant.

"Baptiste Ortis, Nicholas Herbert Lecompte and Hyacinthe St. Cyr, state that about twenty-six years ago (1783), Pierre Condaire inhabited and cultivated a tract of land east of the Mississippi, fronting the town of St. Louis; that he remained on the said tract for three or four years; that he had a house built on the said improvement, and generally sold the produce of his said farm in St. Louis. *Note.*—This statement is corroborated by the certificate of Auguste Chouteau of St. Louis."

* * * * * * *

"The preceding claims appear to be founded in justice, but which have not been claimed within the time limited by law.

MICH. JONES."

American State Papers, Public Land, vol. 2, pp. 613 to 615.

Also, "An Act of Congress of April 16, 1814, confirming certain claims to land in Illinois territory and providing for their location." Sec. 2 of which provides that all the claims contained in said list of Michael Jones should be and were thereby confirmed. Sec. 3 gives the township lines for such location, which covers all of St. Clair County, and extends from Jackson to

Madison County, in Illinois, and includes the land in question. And it should be the duty of the Commissioner of the General Land Office to enter the list aforesaid of record in his office. See 3 U. S. Statutes at Large, pp. 125, 126.

Also, an act of Congress to amend and extend the last preceding act, passed February 27, 1815, the first section of which amended act is substantially as follows:

"That the western boundary of the tract of country set apart," by the preceding act "be extended upon the river Mississippi to the middle thereof, so as to include all islands in said river between the middle and eastern margin, throughout the length of said line, and that all or any of the said islands shall be subject to be appropriated under the said recited act." 3 U. S. Statutes at Large, p. 218.

The plats of the Condaire Survey No. 786, Claim 2667, and the other Surveys covered by it, indicate the Mississippi river as their western boundary. The field-notes of the Condaire Survey made January 15, 1815, are as follows.

"Surveyed for the heirs of Pierre Condaire, who claim in right of Pierre Condaire, 400 acres of land on the east bank of the Mississippi river, and opposite to the Town of St. Louis. Beginning at a post on the northwesterly of the heirs of Richard McCarty's Survey No. 628, Claim No. 1316 from which a hackberry 6 inches in diameter bears south 51 deg. E. 22 links, and a honey locust 3 inches in diameter bears north 30 deg. W. 12 links; thence S. 30 deg. 50 min. W. with said line of said survey 17 poles to a post from which an elm 18 inches in diameter bears S. 25 deg. W. 40 links; thence S. 51 deg. 10 min. E. with another line of the heirs of Richard McCarty's said survey (passing a corner of Nicholas Jarrot's Survey No..... Claim No. 100 at 36 poles) 134 poles to a post on the westerly side of the river L'Abbe or Cahokia Creek; thence down the said River or Creek, with the different courses thereof, S. 74, W. 9 poles, N. 28, W. 26 1-2 poles, N. 80, W. 17 poles, S. 66, W. 17 poles, S. 10 W. 13 poles, S. 32 poles, S. 5 deg. W. 30 poles, S. 21

W. 182 poles, S. 12 E. 50 poles, S. 23 E. 22 poles, S. 12 W. 22 poles, S. 37 deg. E. 88 poles, S. 20 E. 54 poles, to a post from which—thence N. 85 deg. W. 174 poles, *to a post on the bank of the Mississippi River from which—thence N. 5 deg. E. up the Mississippi River and binding therewith* (*passing* the southwesterly corner of Nicholas Jarrot's Survey Number 579, Claim 99, *at* 6 *poles*) 551 poles and ten links, to a post northwesterly corner of Nicholas Jarrot's Survey No....., Claim No. 100, from which a sycamore 36 inches in diameter, bears S. 21 deg. W. 29 links, thence S. 85 deg. E. with the upper line of the last mentioned Survey 88 poles to the beginning.

JANUARY 15, 1815.

True Meridian V 8 deg. 25 min. E., Magnetic Meridian, by which this Survey was made."

"A true copy of the original Field Notes on file in this office.

W. W. H. LAWTON, Custodian U. S. Surveys."

The plats certified by said Custodian are of Island No. 3 (Bloody Island), Surveys No. 579, 624, 766 and 786, and their surroundings. Another plat and field-notes were given in evidence, obtained from the Land Office at St. Louis before it was removed to Springfield, and are in all respects like the foregoing plat and field-notes. The plat and field-notes purport to have been made by Messrs. Rector, Surveyors of private claims in the district of Kaskaskia; and survey 786 purports to cover and extend beyond the other three Surveys.

Also, a patent from the United States, dated May 31, 1848, to the heir of Pierre Condaire in right of said Pierre Condaire or his legal representatives, heirs or assigns, for said Survey No. 786, subject to the claims included in said Surveys 766, 624 and 579 which are excepted and reserved from transfer by said patent.

Also, a patent from the United States to Nicholas Jarrot, dated May 1, 1848, and to his heirs and assigns, for said Survey 579; between which and the river the land in controversy in this suit lies.

Also, two United States patents to Samuel Wiggins for Island No. 3 aforesaid; both dated June 9, 1825. One is for fractional section 11, T. 2 N., R. 10 W. containing 128.86 acres; the other is for fractional section 2, T. 2 N., R. 10 W., containing 3.47 acres.

Also, the plat of United States Surveys of the same.

Also, a deed in fee simple from Joseph Condaire to N. Jarrot, dated April 17, 1809, purporting to convey said Condaire claim, and describing the said Joseph Condaire as the sole heir of Pierre Condaire, duly acknowledged and recorded.

Also, the last will and testament of said Nicholas Jarrot duly proved on the 18th of December 1820; giving Julia Jarrot, his widow and executrix, authority to sell his real estate.

Also, a deed in fee simple from said Julia Jarrot under said will to Samuel Wiggins for the land patented to said Jarrot as aforesaid and for said Condaire Claim and Survey. This deed is dated July 13th, 1822.

Also, a deed from Samuel Wiggins and wife to O'Fallon and others, dated August 1, 1831, for the land on Bloody Island and the Condaire and Jarrot Claims and Surveys.

Also, the private act of the Illinois Legislature of 1853 to incorporate the Wiggins Ferry Company, with power to acquire said lands and franchises, etc. It recites an act of said Legislature of 1819 authorizing said Samuel Wiggins, his heirs and assigns, to establish a ferry on the Mississippi near the town of Illinois in said State and run the same from lands that belong to him; and recites another act of said Legislature of 1821. It gave to a Court of Chancery jurisdiction for the sale of said ferry franchise and property.

Also, the proceedings of the St. Clair Circuit Court in Chancery and a decree against said grantees of Samuel Wiggins who were parties thereto, directing the sale of said franchise and property.

Also, a deed made by the Master in Chancery under said decree to the Wiggins Ferry Company for said ferry franchise the land on said Island No. 3, and the said Jarrot and Condaire Surveys. Under which the Ferry Company claims title in fee simple to the said lands and the alluvion and accretions thereto.

The confirmation of the two Surveys was higher evidence of title than a patent. They were titles by direct act of the government, whereas a patent is only the act of its ministerial officers. Gignon's Lessee vs. Astor, 2 How. U. S. R., 344. A confirmation followed by a survey of land by U. S. authority is conclusive evidence of title; and a subsequent sale by the United States and a patent to a third person is void. Richert vs. Phelps, 6 Wal. U. S. R. 160. Glasgow vs. Horties, 1 Black U. S. R. 595. Ballance vs. Tesson, 12 Ill. R. 326. So a patent from the Government of the United States, for accretions to land which land was before that time conveyed by the Government, for the same reasons, is void. Kreut vs. Crawford, 18 Iowa R. 549.

The certificate of the U. S. Surveyor Rector was record evidence of the boundaries of said Surveys. Kissel vs. St. Louis Public Schools, 18 How. U. S. R. 19. And that original survey must be followed. Bates vs. Ill. C. R. Co., 1 Black U. S. R. 204.

There is no pretense or evidence that the United States authorities or the city of St. Louis, or the persons who constructed the dyke above, or the railroad track below, did so for the purpose of producing these accretions. Riparian proprietors might incidentally suffer or gain by such public works; and the parties causing such public works to be constructed, never set up any claim to these accretions as a result of their labor. Had they done so the claim would have been unavailing as against the owners of the property, who simply acquiesced in those works made for other purposes.

Even where soil is by sudden action of the water, deposited upon the land of another, it does not belong to the first owner when he suffers it to remain in its new position until it cements and coalesces with the soil of the second owner; in which case the property of the soil is changed, and no right to reclaim it remains. 2 Washburn on R. P. 452, 453; Angell on Watercourses, Sec. 60; Bouvier's L. Dic. Tittle *Avulsion;* Woodbury vs. Short, 17 Vermont R. 387. The title to land extends to the center of the earth and water over it. 2 Black. Com. (18). The owner of land at common law is under no legal or moral obligation to pay for improvements made on his land without his request. Carson vs. Clark, 1 Scam. R. 113; Dooley vs. Crist, 25 Ill. R. 551.

The fact that these accretions may have been caused in part by the works of others made for other purposes in wholly immaterial. Halsey vs. McCormick, 18 N. Y. R. 150; New Orleans vs. United States, 10 Peters' U. S. R. 662; Jones vs. Soulard, 24 How. U. S. R. 41; R. R. Co. vs. Schumier, 7 Wal. U. S. R. 287; The Schools vs. Risley, 10 Wal. U. S. R. 110; Godfrey vs. City of Alton, 12 Ill. R. 29.

On no river in the world is the doctrine of accretion more justly applicable than on the banks of the Mississippi river, where from June, and other floods, the channel and banks are constantly changing. Lands in controversy on this river, may any year disappear in its waters as did, since the suit for it, Duncan's Island, situated on the other side of this river, nearly opposite the lands in question, from the same causes that produced the alluvion now sued for That case is decided in 24 Howard U. S. R. 41, &c., and this case must be controlled by principles therein announced. It is well said by this Court, per McLean, J., in New Orleans vs. United States, 10 Peters' U. S. R. 717, "The question is settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is

subject to loss by the same means which may add to his territory and as he is without remedy for his loss in this way he cannot be held accountable for his gain."

In all the subsequent cases decided by the U. S. Courts the owner of land bounded on that river was held entitled to the accretions thereto. Saulett vs. Sheppard, 4 Wal. U. S. R. 502. In Jones vs. Soulard, 24 How. U. S. R. 65, the Court, per Catron, J., says: "'From thence by the Mississippi to the place first mentioned' is as apt expression to confer riparian rights to the proprietor of the tract as the call could well be, unless the last call had been for the middle of the river."

"Many authorities resting on adjudged cases have been adduced to us in the printed argument to show that from the days of Sir Matthew Hale to the present time all grants of lands bounded by fresh-water rivers, where the expressions designating the water-line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions." "We think this as a general rule too well settled, as part of the American and English law of real property, to be open to discussion; and the inquiry here is, whether the rule applies to so great and public a watercourse as the Mississippi is, at the city of St. Louis? The land grant to which the accretion attached has nothing peculiar in it to form an exception from the rule; it is an irregular piece of land, of seventy-nine acres, found vacant by the Surveyor-General, and surveyed by him as a school lot in conformity to the act of 1812."

"The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark has no application in this case: nor does the size of the river alter the rule. To hold that it did, would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers, as matter of fact, rather than proceeding on established principles of law."

In Railroad Co. vs. Schumier, 7 Wal. U. S. R. 286, 287, this Court, per Clifford, J., says: "Express decision of the Supreme

Court of the State (Minnesota) was that the river in this case and not the meander-line, is the west boundary of the lot, and in that conclusion of the State Court we entirely concur. The meander-lines are run, in surveying portions of public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fractions subject to sale and which is to be paid for by the purchaser. In preparing the official plat from the field-notes the meander-line is represented as the border line of the stream, and shows to a demonstration, that watercourse, and not the meander-line as actually run on the land, is the boundary."

"Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream; but the better opinion is that proprietors of land bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be and remain public highways. Grants of land bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway. 3 Kent's Com. (427)."

"The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river; because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the center of it; and he consequently holds that the fee passes to that extent. Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country. Except in one or two States, those rules have been adopted in this coun-

try, as applied to rivers not navigable, when named in a grant or deed as a boundary to land."

In The Schools vs. Risley, decided in December, 1869, 10 Wal. U. S. R. 110, in relation to accretions to land in St. Louis opposite to the tract involved in this suit, the Court, per Clifford, J., says: "Beyond doubt, block forty-four, if it was inhabited, cultivated and possessed prior to December 20, 1803, as claimed by the defendant, was confirmed by the first section of the act of June 13, 1812; and if it extended to the river at that time it is clear that the owners thereof were riparian owners; and if so, it is equally clear that they were entitled, as such, to all the accretion thereto occasioned by alluvial deposits or by the gradual recession of the waters of the river from the usual water-mark." See also Yates vs. Milwaukee, 10 Wal. U. S. R. 504; Weber vs. Harbor Com., 18 *Id.* 65.

The highest Court in every State on the Mississippi river from St. Paul to New Orleans has decided that accretions belong to owners of land on that river, as riparian proprietors.

In *Minnesota*, Schumier vs. The Railroad, 10 Minn. R. 82.

In *Iowa*, Kreut vs. Crawford, 18 Iowa R. 549.

In *Wisconsin*, Jones vs. Pettibone, 2 Wis. R. 308; Walker vs. Shephardson, 4 *id.* 486.

In *Missouri*, Shelton vs. Maupin, 16 Mo. R. 128; Smith vs. St. Louis Public Schools, 30 Mo. R. 290.

In *Arkansas*, Warren vs. Chambers, 25 Ark. R. 120.

In *Kentucky*, Thurman vs. Morrison, 14 B. Monroe R. 371; 17 *id.* 253.

In *Tennessee*, Stuart vs. Clark's Lessee, 2 Swan's R. 9; Corporation of Memphis vs. Overton, 3 Yerger R. 387.

In *Mississippi*, Morgan vs. Reading, 3 Smeades & Marshall R. 366; Magnolia vs. Marshall, 39 Missip. R. 111. This last case was very ably argued and well considered.

In *Louisiana*, Morgan vs. Livingston, 6 Martin R. 19, 25; Municipality No. 2 vs. Orleans Cotton Press, 18 Lou. R. 122.

In *Illinois*. The leading case in this State is Middleton vs. Prichard, 3 Scam. R. 510. That case was decided in 1842, after an exhaustive examination of the authorities by the Court. The Court decided that on the Mississippi river all alluvion belongs to the riparian proprietor, both by the common and civil law. The same rule holds as to losses by gradual washing away; and the owner of a fraction of land surveyed on the banks of the river was entitled to an island formed between his land, after it was surveyed, and the center of the river. This is said, in 3 Kent's Com., 11th ed. (427) note *d*, to be "a clear and frank exposition of the common law in this learned case, and especially in respect to Government grants." That "it does honor to the Court that delivered it." "These decisions of the Court of Illinois and Mississippi are highly creditable to their learning and firmness," etc.

In 1868 the question was again before the Supreme Court of Illinois, in the case of Ensminger vs. The People, 47 Ill. R. 388, 389. The Court says: "There can be no doubt when the case in 3 Scam. R. was determined, it announced the rule held by the current of authorities of that day, and a careful examination of adjudged cases and elementary writers of the present day, show they announce the same rule," etc. "If this rule were changed it would deprive large numbers of rights, in the aggregate amounting to immense sums, which they had acquired under, as they supposed and had every reason to suppose, a solemn assurance of the law that they should be protected in those rights. The promotion of justice, the stability of titles, or the well-being of society, do not require that this decision should be disturbed," etc. "We, therefore, decline to review the grounds of that decision, but accept it as the settled law of this State." The authorities in this State are afterwards reviewed by the same Court in Chicago vs. Laflin, 49 Ill. R. 175, 176, and the same conclusion announced.

Accretion, or alluvion, is the addition made to land by the washing of the sea or rivers; and the characteristic of alluvion is its imperceptible increase, so that it cannot be perceived how

much is added in *each moment* of time. What is taken from one side is usually carried on the opposite bank. In cases where the change is so gradual as not to be perceived in any one moment of time, the proprietor whose bank on the river is increased, is entitled to the addition. Alluvion differs from avulsion; (*q. v.*) in the latter the change is sudden and perceptible. Bouvier's Law Dictionary, title *Avulsion*, and authorities therein cited; 2 Blackstone's Com. (262); Angell on Watercourses, Sec. 53. In section 54 the word Imperceptible, is defined and illustrated. In note 1 to that section Mr. Livingston's remarks in the case in 10 Peters R. already cited, are stated as follows: "When the ingenious counsel can analyze the different deposits, separate the sands of the Red River, the rich mould of the Missouri, from the clay and other various soils which the Mississippi receives from a thousand tributary streams; when he can dive into its turbid eddies, watch the moment of its precious deposits, and date the existence of each stratum of its increase, then this first branch of the authority he has just cited may be applicable to his cause." See also Lamb vs. Ricketts, 11 Ohio R. 311.

When the Government sells or confirms land on the Mississippi river, where the quantity of land to be enjoyed is so uncertain, it is desirable to know how much is immediately available for cultivation or ordinary use, hence the survey is made of the land not covered by the river although it is evident from the act of February 11, 1815, in relation to confirmations of land on this river within the territory where this land was confirmed, that Congress intended the middle of the river to be the western boundary of the land. The lines were run not as boundaries of each tract, but for the purpose of defining the sinuosities of the stream, and as a means of ascertaining the quantity of land then available for use. Middleton vs. Prichard, 3 Scam. R. 510, 522; Railroad Co. vs. Schumier, 7 Wal. U. S. R. 272, 286, 287.

All the plats in this case indicate that the Jarrot Survey, No. 579 (between which and the river the land sued for lies), was intended to have been bounded on the river, but the field-notes

of said survey begin on the bank of the river, thence S. 5 W. 160 poles to "a point in the river," etc. This was perhaps to include the 100 acres and to make the west line straight and avoid the sinuosities of the bank. These surveys and plats should all be taken together and made to harmonize if possible with the intention of the U. S. surveyors at the time, if not inconsistent with the laws of the U. S. government.

Thus it will be seen that had the Wiggins Ferry Co. only shown title under survey 579, they might be entitled to the accretions to said survey, and the river fronting the same as a boundary, as against all but the Condaire survey and perhaps against that, as a prior survey thereto. The title to the land on Bloody Island entered by Samuel Wiggins under the act of April 16, 1814, and February 27,1815, gave him the middle of the river as his western boundary and the right to the accretions on the south end of said Island except as against riparian proprietors south of his said entry and who were entitled to a river front.

The original channel of the Mississippi river, was west of Bloody Island. It afterwards changed for a time to the east side of that Island, and was subsequently thrown back to its old channel west of that Island where it now runs, as appears by the record in this case of the testimony of Jonathan Moore, A. G. Moore and Col. Jarrot.

The defendants' title under the Condaire survey No. 786, settles beyond all controversy the right to these accretions. The western line of that survey was from a post on the bank of the Mississippi river, thence "up the river and *binding therewith*, *passing* the southwesterly corner of said survey 579," etc. No surveyor or jury could lawfully say this line was uncertain as the west line of the other surveys. If the river was not intended as the western boundary the field-notes would not say "binding therewith," and two points would be given on the west side.

Condaire was entitled to four hundred acres of land; and this survey only gave him about one hundred acres of land then available for use, as appears from Col. Jarrot's testimony. The other three hundred acres within the lines of his survey before the survey for him, had been confirmed to other parties; and the patent to him expressly excepted from its operation those three prior surveys. All left for his survey was the lands covered thereby outside of said three surveys; with a chance of alluvion on the river. "In those three surveys" Col. Jarrot testifies, "there is nothing said about binding with the river, etc., there might be some pieces of land left between those claims and the river which the Condaire claim would cover. It is very possible there were. It is not likely that the river was so straight that they could run each of those three tracts its whole length straight and follow the river. The river was not that straight." With the accretion sued for, Condaire's grantee would only get his 400 acres. When a line is described as running in a certain direction to a river, thence up or down the same, or with the river, these words necessarily imply that the line is to follow the river according to its meanderings and turnings; and that of course must be the middle of the river. Angell on Watercourses, secs. 17, 28, 29, 30, and notes; 3 Kent's Com. (427). And that is so, although the monuments are described as standing on the margin or banks of the stream. Coldwater Iron Works vs. Ins. of Tolland, 9 Cush. (Mass.) R. 496; Harlow vs. Fiske, 12 *id.* 302.

Under this rule of the common law, as well as by the act of Congress of February 27, 1815, before referred to, which establishes the middle of the Mississippi river as the western boundary of claims and surveys like Condaire's, the heir or legal representatives of Pierre Condaire were entitled in fee, subject to the public easement, to the middle of the river as it then existed, with its channel west of Bloody Island, where it now is, including the land in controversy in this suit; and the deposits on said land do not divest them of said title, even if under the peculiar circumstances of this case the Jarrot survey should be limited to its original surveyed line on the west. In conclusion, we will

call the special attention of the Court to the unanimous decision of the Supreme Court of Illinois in this case, and its forcible reasons, as given by Thornton, J.

After having the pleasure of seeing the printed arguments for plaintiff in error in this Court we may attach to this argument a reply thereto, if we deem it necessary; assuming that no plausible grounds, which ability, ingenuity and industry can present, will be omitted by the learned attorneys for the plaintiff in error.

WM. H. UNDERWOOD,

Oct. 24, 1874. *Attorney for Defendants.*